

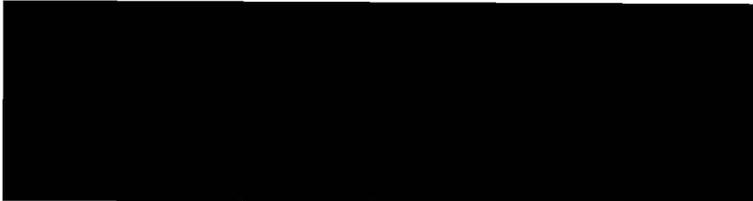


U.S. Citizenship
and Immigration
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FILE: LIN 04 062 51658 Office: NEBRASKA SERVICE CENTER Date: MAR 06 2006

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:



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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software consulting and leather manufacturer corporation. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. 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 four-year college degree required by the preference classification for which the Alien Employment Certification accompanying the petition specified and denied the position accordingly.

On appeal, the counsel submits a brief.

Section 203(b)(3)(A)(i) of 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.

8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(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 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.

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.

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), 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 13, 2003. The petitioner selected in Part 2, check box “e” of the I-140 petition. That selection 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, Form ETA 750 A, item 14 describes the requirements of the proffered position and occupation of programmer analyst as follows:

14.	Education (enter number of years)	
	Grade School	Blank
	High School	Blank
	College	<u>4</u>
	College Degree Required	<u>BSc or Foreign Academic Equivalent</u>
	Major Field of Study	<u>Computer Science</u>
	Training	N/A
	Experience	
	Job Offered	
	Number –Years / Mos.	<u>2/0</u>
	Related Occupation	
	Number –Years / Mos.	<u>2/0</u>
	Related Occupation	
	Specify	<u>Software Engineer Systems Analyst</u>

The employer who is the petitioner has prepared the above ETA 750 A as an essential part of the labor certification process used to support a preference visa petition that is employment based. The 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 which, once approved, certifies the Alien Employment Application for the occupation based upon the above criteria. In the present case, the above requirements also state that the occupation of programmer analyst has a four-year college degree or its foreign academic equivalent, in the Computer Science major field of study. In related occupations identified as Software Engineer Systems Analyst, the employer/petitioner requires two 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 the following education history:

Block 11

Names and Addresses of Schools, Colleges, and Universities Attended (including trade or vocational training facilities)

Nagpur University

Field of Study	<u>ENGINEERING</u>
From ...[mo./yr]	<u>June 1993</u>
To ...[mo./yr.]	<u>July 1997</u>
Degrees or Certificates Received	<u>Bachelor of Engineering</u>

Maharashtra State Board of Secondary And Higher Secondary Education

Field of Study	<u>All subjects</u>
From ...[mo./yr]	<u>1991</u>
To ...[mo./yr.]	<u>1993</u>
Degrees or Certificates Received	<u>Secondary Degree</u>



Field of Study	<u>Autocad</u>
From ...[mo./yr]	<u>Dec [December] 1997</u>
To ...[mo./yr.]	<u>Mar [March] 1998</u>
Degrees or Certificates Received	<u>Autocad R-14</u> <u>Level I, II, III</u>



Field of Study	<u>Power-Builder</u>
From ...[mo./yr]	<u>Nov [November] 1997</u>
To ...[mo./yr.]	<u>Jan [January] 1998</u>
Degrees or Certificates Received	<u>Powerbuilder</u>

The director issued a request for evidence dated April 7, 2004. The director requested evidence, among other items, that the beneficiary possessed the foreign academic equivalent of a bachelor's degree in Computer Science.

The petitioner submitted on June 29, 2004, an evaluation report mentioned below, and, counsel provided employment reference letters.

As mentioned, the director determined that the petitioner had not established that the beneficiary had the four-year college degree required by the preference classification for which the Alien Employment Certification accompanying the petition specified and denied the petition accordingly on August 20, 2004.

On appeal, the counsel asserts, "Erroneous denial based on equivalent degree."

Counsel erroneously submitted another Form I-290B as a motion to reconsider (alternative to appeal) filed October 25, 2004, after a timely appeal filed September 22, 2004. Since there is no brief or additional evidence with the September 22, 2004 appeal, but there is an explanatory letter in the record of proceeding accompanying the motion to reconsider (since returned by CIS), we will consider the explanatory letter in this matter.

Counsel asserts "CIS erroneously denied this case on the grounds of alleged flaws in the recruitment process during RIR [reduction in recruitment] labor certification." Counsel states that CIS should have raised the issue in the request for evidence so the petitioner would have "a chance to rebut the argument."

A reading of the director's decision would indicate that the director did consider such evidence. Although there is no evidence of erroneous findings of fact, if the director made erroneous findings of fact, that decision does not require the AAO to approve applications or petitions where eligibility has not been demonstrated. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

The Administrative Appeals Office is never bound by a decision of a service center or district Director. *See Louisiana Philharmonic Orchestra vs. INS*, 44 F. Supp. 2d 800, 803 (E.D. La. 2000), *aff'd.*, 248 F. 3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). The authority to adjudicate appeals is delegated to the AAO by the Secretary of Homeland Security pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. 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).

In determining the respective jurisdictions of the Department of Labor and this Service, one may turn to the entire body of recent court proceedings interpreting the interplay of the agencies and strictly confining the final determination made by the Department of Labor. *See Stewart Infra-Red Commissary, Etc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981); *Denver Tofu Company v. District Director, Etc.*, 525 F. Supp. 254 (D. Colo. 1981); and *Joseph v. Landon*, 679 F.2d 113 (7th Cir. 1982).

These cases recognize the labor certification process and the authority of the Department of Labor in this process stem from section 214(a)(14) of the Act, 8 U.S.C. 1182(a)(14). In labor certification proceedings, the Secretary of Labor's determination is limited to analysis of the relevant job market conditions and the effect, which the grant of a visa would have on the employment situation. The CIS, through the statutorily imposed requirement found in section 204 of the Act, 8 U.S.C. 1154, must investigate the facts in each case and, after consultation with the Department of Labor, determine if the material facts in the petition including the certification are true.

Although the advisory opinions of other Government agencies are given considerable weight, the CIS has authority to make the final decision about a beneficiary's eligibility for occupational preference classification. The Department of Labor is responsible for decisions about the availability of United States workers and the effect of a prospective employee's employment on wages and working conditions. The Department of Labor's decisions concerning these factors, however, do not limit the CIS's authority regarding eligibility for

occupational preference classification. Therefore, the issuance of a labor certification does not necessarily mean a visa petition will be approved.

The subject Form ETA 750 Part A requires a degree from a college and the completion of four years of baccalaureate studies culminating in a Bachelor's of Science degree in Computer Science. CIS regulations do not provide that a combination of education and experience may be accepted in lieu of a four-year degree. The petitioner has submitted letters of employment from various technology companies that employed the beneficiary. While the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) do state that the "relevant post secondary education may be considered as training for the purposes of this paragraph;" there is no regulation that would allow for a converse, that the experience may be considered for education requirements.

Petitioner's clear intent is expressed in the certified Alien Employment Application. A four-year college degree is required in the Computer Science major field of study. Note that even if this petition were considered under the skilled worker regulations, the result would be the same. While it is clear that regulations governing the skilled worker classification do not contain a baccalaureate degree requirement, CIS is still bound by the regulations and above-cited case law to require the petitioner and beneficiary to meet the requirements specified on the ETA-750. See 8 C.F.R. § 204.5 (l)(3)(ii)(B). Regardless of classification, the ETA-750 contains the requirements that the beneficiary must have four years of college education and a bachelor's degree in the Computer Science major field of study or it's equivalency.

The petitioner submitted an education credential evaluation from Morningside Evaluations and Consulting dated October 2, 2000, of the beneficiary's foreign schooling as it equates to a higher education offered in the United States. The evaluation stated in pertinent part that the beneficiary "...has attained the equivalent of a Bachelor of Science degree in Electronics Engineering ..." rather than Computer Science "... from an accredited institution of higher education in the United States."

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, by petitioner's credential evaluator, the beneficiary "... has attained the equivalent of a Bachelor of Science degree in Electronics Engineering from an accredited institution of higher education in the United States." This matter is not in dispute.

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) and 8 C.F.R. § 204.5(l)(3)(ii)(C). Although certain regulations for temporary worker status allow a combination of education and experience, the immigrant visas (employment based third preference) regulations do not. In addition, the Form ETA 750 separates education from experience.

The above regulations at 8 C.F.R. § 204.5(l)(3)(ii)(C) use a singular description of foreign equivalent degree. Thus, for professionals, 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.¹

¹Certain nonimmigrant visas do allow a combination of education and experience. See 8 C.F.R. § 214.2 (h)(4)(iii)(C)(5).

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 professions.”² The Certified Alien Employment application does not allow for other similar degrees in lieu of a Bachelor’s of Science degree in Computer Science.

The petitioner failed to submit evidence sufficient to demonstrate that the beneficiary has an equivalent foreign degree in Bachelor’s of Science in Computer Science and, the petitioner had not established that the beneficiary has the four-year college degree required by the preference classification for which the Alien Employment Certification accompanying the petition specified. The instant petition, submitted pursuant to pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3) 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.

² 8 C.F.R. § 204.5(1)(2).