



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



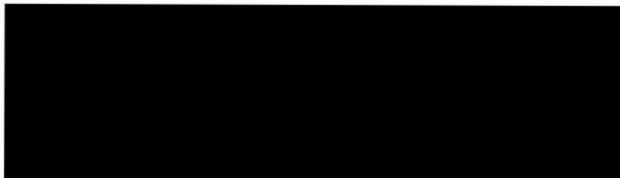
B6

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: MAR 21 2007
WAC 05 021 52384

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a semiconductor manufacturer. It seeks to employ the beneficiary permanently in the United States as a mechanical engineer. 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 approved labor certification in the instant case and denied the petition accordingly.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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)(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 8, 2002.

The Form ETA 750 states that the proffered position requires four years of college culminating in a bachelor's degree in mechanical engineering and five years of experience as a mechanical engineer. On the Form ETA 750B the beneficiary stated that he obtained an associate's degree in Engineering technology from

the Automobile College in Beijing in August 1980 and a bachelor's degree in Mechanical Engineering from the University of Wisconsin at Parkside in December 1995.¹

In the instant case the record contains (1) an educational evaluation dated February 15, 1991, (2) an educational evaluation dated January 29, 2001, (3) an educational evaluation dated July 14, 2005, (4) a diploma from the University of Wisconsin-Parkside, (5) a transcript from the University of Wisconsin-Parkside, and (6) a Chinese diploma and transcript with English translations. The record does not contain any other evidence relevant to the beneficiary's education. The record does, however, contain considerable documentation pertinent to the beneficiary's employment experience.

The February 15, 1991 educational evaluation indicates that the beneficiary's May 1981 Chinese diploma from the Beijing Automobile College, awarded to confirm graduation in August 1980, "represents completion of the equivalent of community college level work in the United States" and a total of 71½ semester hours of credit in an engineering technology curriculum.

The January 29, 2001 educational evaluation, however, states that the beneficiary studied for four years at the Beijing Automobile College and was awarded a bachelor of engineering degree from that institution, Beijing Automobile College. The evaluation further states that this degree is the equivalent of a bachelor's degree in mechanical engineering earned at an accredited institution in the United States.

The July 14, 2005 educational evaluation states that the beneficiary's Chinese degree is equivalent to two years of university-level study in mechanical technology. That evaluation further states that, pursuant to the equation of three years of related experience to one year of college, the beneficiary has, based on his education and experience together, the equivalent of a bachelor's degree in mechanical engineering.

The beneficiary's Chinese diploma is dated May 1981 and states that the beneficiary studied mechanical manufacturing in the Automobile College of Beijing and graduated in August of 1980. The transcript shows that the beneficiary took 20 classes including 17 related to mechanical manufacturing.

The beneficiary's University of Wisconsin diploma, dated December 17, 1995, does not state the beneficiary's major course of study at that university that led to the acquisition of the diploma. The accompanying transcript, however, indicates that the beneficiary's diploma was in interdisciplinary studies and that, other than two mathematics classes, he attempted no classes related to mechanical engineering at that institution.

The director determined that the evidence submitted did not establish that the beneficiary has a United States baccalaureate degree or an equivalent foreign degree, and, on August 11, 2005, denied the petition. The director noted that the February 15, 1991 and January 29, 2001 educational evaluations in the record are inconsistent in that one states that the beneficiary's Chinese diploma is equivalent to a bachelor's degree in mechanical engineering and the other states that it is equivalent to an associates degree in engineering technology from a community college. The director also noted that, pursuant to *Matter of Ho*, 19 I&N Dec.

¹ The transcript of the beneficiary's courses at the University of Wisconsin, subsequently submitted, does not support that the beneficiary studied mechanical engineering at that institution.

582 (Comm. 1988) the petitioner is obliged to reconcile any discrepancies in the record with competent objective evidence sufficient to demonstrate where the truth, in fact, lies.

On appeal, counsel submitted the July 14, 2005 educational evaluation. Counsel asserts that the third evaluation shows that the beneficiary's education and experience, taken together, are equivalent to a bachelor's degree in mechanical engineering.

The February 15, 1991 educational evaluation indicates that the beneficiary's Chinese degree is the equivalent of only an associate's degree. Clearly, that evaluation does not support the proposition that the beneficiary has the required bachelor's degree or foreign equivalent degree in mechanical engineering, or support the proposition that the instant petition can be approved.

The January 29, 2001 educational evaluation, on the other hand, indicates that the beneficiary's Chinese degree is the equivalent of the required bachelor's degree in mechanical engineering. Based on the obvious discrepancy the director denied the petition. The director also noted that case law states that the discrepancy could only be reconciled by independent objective evidence.

Instead of objective evidence, counsel provided a third educational evaluation. This evidence is insufficient to reconcile the discrepancy in the evidence previously submitted. Even if that third educational evaluation were an acceptable substitute for objective evidence, however, and accorded great evidentiary weight, it would be insufficient to establish that the instant petition is approvable.

The labor certification in this case states that the proffered position requires four years of college culminating in a bachelor's degree in mechanical engineering. Counsel argued that the beneficiary's associate's degree, combined with his employment experience, qualifies him for the proffered position, notwithstanding that the position requires a bachelor's degree.

The regulation at 8 C.F.R. § 204.5(k)(2) allows an alien to substitute a bachelor's degree plus five years of progressive experience for an advanced degree. The regulation at 8 C.F.R. § 214(h)(2)(iii)(D)(5) permits the substitution of three years of experience for one year of college for specialty occupation nonimmigrants. Clearly CIS' predecessor agency was capable of issuing regulations providing for the substitution of experience for education in a limited context. Despite this capability, no such provisions appear at 8 C.F.R. § 204.5(l) and its subparagraphs relating to professionals and skilled workers.

Although the regulations pertinent to nonimmigrant petitions explicitly permit the substitution of experience for education and a degree, the laws and regulations applicable to the visa category in the instant case sanction no such substitution of experience for education and a degree and provide no formula pursuant to which such experience might be credited in lieu of education and a degree.

The only regulation specifying the equivalent of a bachelor's degree in the context of immigrant petitions is 8 C.F.R. § 204.5(l)(1), which states that a "United States baccalaureate degree or a foreign equivalent degree" qualifies a beneficiary for a professional position pursuant to section 203(b)(3)(A)(ii) of the Act. That regulation makes clear that the only equivalent for a U.S. bachelor's degree, in that context, is an equivalent foreign degree. No such equivalent is available if the petition is analyzed as a petition for a skilled worker. No

criterion exists pursuant to which the beneficiary's experience, or experience coupled with education, absent the requisite bachelor's degree, may be analyzed to see whether it is equivalent to the requisite degree.

The petitioner was free to specify on the Form ETA 750 the qualifications that it would accept as equivalent to a bachelor's degree² but did not.³ The director was therefore correct in treating the petition as one for a professional, and in using the criteria in the regulation at 8 C.F.R. § 204.5(1)(2) to evaluate the term "or equivalent" in the labor certification.

If the instant petition is analyzed as a petition for a professional pursuant to section 203(b)(3)(A)(ii) of the Act it necessarily fails, as the regulation at 8 C.F.R. § 204.5(1)(3)(ii)(C) makes clear that such a position requires a U.S. bachelor's degree or an equivalent foreign degree in computer science or a related subject. The beneficiary does not have that required degree.

If the instant petition is analyzed as a petition for a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act the result is the same. If the petition were considered as a petition for a skilled worker, the requirement as stated on the ETA 750 for a bachelor's degree or an equivalent foreign degree would be unaffected. The petitioner must demonstrate that the beneficiary is qualified for the proffered position pursuant to the requirements stated on the approved Form ETA 750 labor certification. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The petitioner failed to demonstrate that the beneficiary has a United States baccalaureate or an equivalent foreign degree. The petition was correctly denied on this basis, which has not been overcome on appeal. 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.

² In that event the petition would be analyzed as a petition for a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act, as it would not necessarily require a minimum of a bachelor's or equivalent foreign degree and would not, therefore, be a petition for a professional pursuant to section 203(b)(3)(A)(ii).

³ Had the petitioner specified an acceptable substitute for the requisite bachelor's degree in this case, that would have opened the position to U.S. workers without degrees. Although those non-graduate workers were apparently excluded from consideration for the proffered position, the petitioner now seeks to hire an alien worker without such a degree. The purpose of the instant visa category is to provide alien workers for U.S. positions, but only if qualified U.S. workers are unavailable. To permit the petitioner to alter the terms of the approved labor certification such that the beneficiary is eligible for the petition after the petitioner excluded U.S. workers with similar qualifications would frustrate the purpose of the visa category.