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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: WAC 04 181 51797 Office: CALIFORNIA SERVICE CENTER

Date: JUL 01 2008

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an electronics manufacturer. It seeks to employ the beneficiary permanently in the United States as a market research analyst.¹ As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position because the beneficiary has a three-year bachelor's degree diploma in English Literature, rather than the stipulated four-year baccalaureate degree in management or business administration.² The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by 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 April 29, 2005 denial, the single issue in the current petition is whether the beneficiary is qualified to perform the duties of the proffered position.

Section 203(b)(3)(A)(i) of the Act 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 nature, for which qualified workers are not available in the United States. While no degree is required for this classification, the regulation at 8 C.F.R. § 204.5(l)(3)(B) provides that a petition for an alien in this classification must be accompanied by evidence that the beneficiary "meets the education, training or experience, *and any other requirements of the individual labor certification.*" (Emphasis added.)

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. While the Form I-140, Part 2 includes both skilled workers and professionals in the same box, on appeal counsel expressly contends that the beneficiary is "a member of the profession."

In addition, 8 C.F.R. §204.5(l)(3)(ii)(C) states:

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

¹ The title of market research analyst appears on the ETA Form 750, Part A, while the petitioner indicated on the I-140 petition that the job title was project analyst.

² The director in his decision stated that the ETA Form 750 submitted by the petitioner stated that the minimum qualifications for the proffered position were a baccalaureate degree or its equivalent, in management/business administration and two years of experience. However, the ETA Form does not require a bachelor's degree or equivalent. The Form simply states that a four-year bachelor's degree in management/business administration is required.

submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on June 5, 2001. This date is the priority date. 8 C.F.R. § 204.5(d).

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal³. On appeal, counsel submits a copy of the beneficiary's Bachelor of Science in Business Management diploma from the University of Phoenix dated September 30, 2004. Counsel also submits the beneficiary's transcript that indicates he earned 78 credit hours based on exams or classes attended from 2002 to 2004. Counsel also submits an interoffice memorandum written by William R. Yates, Associate Director, Operations in 2005,⁴ and resubmits an educational equivalency report written by ██████████ Pace University, White Plains, New York, on May 13, 2004. In this document, ██████████ combined the beneficiary's education, training and work experience. Specifically, ██████████ determined that the beneficiary had attained the equivalent of a bachelor of science degree, with a dual major in business administration and English literature, based on his academic studies and professional experience in the business field from September 1992 through April 1996, and March 1999 to April 2001. ██████████ further noted in his evaluation that the beneficiary had completed the equivalent of three years of academic studies leading to a bachelor's level degree with a major in English literature, from an accredited U.S. institution of higher education.

The record also contains a copy of the beneficiary's diploma from Shandong Teachers University, dated July 1992. This document states that the beneficiary graduated from the University after a three-year plan of studies in English literature on the Qingdao campus. The record also contains the beneficiary's report card that lists all classes undertaken during his three years of academic studies at Shandong Teachers University. The report card indicates the beneficiary attended one class in business or business management during his three-year baccalaureate program, namely, Foreign Trade Practice, taken in the second semester of his third year of studies. The petitioner also submitted an employment letter affirming the beneficiary's employment for Hyundai from September 1992 through April 1996. The record does not contain any other evidence relevant to the beneficiary's qualifications to perform the duties of the proffered position as of the priority date.

³ 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).

⁴ Memorandum from William R. Yates, Associate Director For Operations, *Requests for Evidence (RFE) and Notices of Intent to Deny (NOID) HQOPRD 70/2* (February 16, 2005).

On appeal, counsel states the beneficiary is a member of the professions in the area of intended employment and that the director abused his discretion in denying the instant petition, and in failing to provide the petitioner with a request for further evidence to provide additional evidence.

Counsel then states that the petitioner has met its burden of proof through a preponderance of the evidence, and has established that the beneficiary, through professional work experience and post-secondary education, possessed the equivalent of a bachelor of science degree with a dual major in business administration and English literature from an accredited U.S. institution. Counsel cites *Omni Packaging, Inc. vs. U.S. I.N.S.*, 733 F. Supp. 500 (D. Puerto Rico, 1990), and *Augat, Inc. v. Tabor*, 719 F.Supp. 1158 (D.Mass. 1989). With regard to *Omni Packaging, Inc.*, counsel states that the court in this decision noted that in some instances, an applicant may be granted third preference status as a member of a profession even though he has no college degree based on the beneficiary's specialized knowledge, training or experience that was equivalent to a professional degree. With regard to *Augat*, counsel states that the court found that the petitioner's employee was a member of the professions within the meaning of the statute.

Counsel also cites *Matter of Yaakov* 13 I&N Dec. 203 (BIA 1969), which in turn refers to *Matter of Bienkowski*, 12 I&N, Dec. 17 (D.D. 1966), stating that *Yaakov* indicates that legacy INS has held that experience may be substituted for formal education. Counsel states that in the instant petition Citizenship and Immigration Services (CIS) failed to consider whether an exception to the baccalaureate degree was warranted, and that the beneficiary qualified as a member of the professions based on his three years of education and over five years of progressively responsible work experience in the area of intended employment.

Counsel also asserts CIS arbitrarily decided not to issue a RFE or a NOID to allow the petitioner to provide additional evidence. Counsel refers to the Yates memorandum and notes that a petition may be approved or denied with a request for evidence or a notice of intent to deny when there is "clear ineligibility" or "the record is complete and the case is approvable." Counsel states the examples cited by Mr. Yates in his memorandum do not include issues regarding whether or not the beneficiary is a member of the professions in the area of intended employment. Counsel also notes that Mr. Yates strongly recommended a request of further evidence when the evidence raises underlying questions regarding eligibility or does not fully establish eligibility.

The memorandum cited by counsel says that no RFE or NOID is required where evidence reflects an inability to meet a basic statutory or regulatory requirement. In this matter, as will be explained below, the initial evidence demonstrated that the beneficiary did not have the necessary education for the job certified by DOL. Thus, the director did not err procedurally. Nevertheless, we will consider all new assertions and evidence on appeal.

Counsel concludes by noting that the beneficiary has earned an additional Bachelor of Science degree in business management from the University of Phoenix, a U.S. institution. Counsel cites this fact as further evidence that the petitioner was not provided an opportunity to cure deficiencies in the instant petition, prior to the director's issuance of his decision to deny the petition.

On appeal, counsel states that CIS arbitrarily decided not to issue a RFE or NOID to the petitioner and references the Yates memo. The AAO notes that the Yates memo says that no RFE or NOID is required where evidence reflects an inability to meet a basic statutory or regulatory requirement. In the instant petition, as will be discussed

below, the initial evidence demonstrated that the beneficiary did not have and did not claim to have the necessary degree. Thus, no RFE or NOID was required.

On appeal, counsel also asserts that the director erred in failing to consider the beneficiary's employment experience in determining his qualifications for the proffered position and cites *Augat, Inc. v. Tabor*, 719 F.Supp. at 1158 ; *Omni Packaging, Inc. vs. U.S. I.N.S.*, 733 F. Supp. At 500; *Matter of Yaakov*, 12 I&N Dec. at 203, and *Matter of Bienkowski*, 12 I &N Dec. at 17. In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Augat is inapplicable to the instant petition because the court defines "professional" as it was defined in the Act from its historical context, when section 1153(a)(3) failed to define "professional" with a baccalaureate degree. The Act currently defines "profession" for third preference visa petitions as "immigrants who hold baccalaureate degrees." *See* Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii). Thus, *Augat*, is irrelevant as it defines third preference petition "professionals" prior to Congress amending that same statutory provision and providing the current definition given to "professionals" that includes a degree requirement. *Augat*, is thus distinguishable and irrelevant.

For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official *college or university* record showing the date the baccalaureate degree was awarded and the area of concentration of study." (Emphasis added.) Moreover, it is significant that both the statute, section 203(b)(3)(A)(ii) of the Act, and relevant regulations use the word "degree" in relation to professionals. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d. 1289, 1295 (5th Cir. 1987). It can be presumed that Congress' narrow requirement of a "degree" for members of the professions is deliberate. Significantly, in another context, Congress has broadly referenced "the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning." Section 203(b)(2)(C) (relating to aliens of exceptional ability). Thus, the requirement at section 203(b)(3)(A)(ii) that an eligible alien both have a baccalaureate "degree" and be a member of the professions reveals that member of the professions must have a *degree* and that a diploma or certificate from an institution of learning other than a college or university is a potentially similar but distinct type of credential.

Further counsel on appeal submits documentation as to an additional academic credential earned by the beneficiary in 2004 from the University of Phoenix. However, as stated previously, the petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. at 158. The Form ETA 750 was accepted on June 5, 2001, three years prior to the beneficiary's completion of his studies at the University of Phoenix. The petitioner had to establish as of June 5, 2001, that the beneficiary held a four-year baccalaureate degree in management/business administration.

Thus the beneficiary's second bachelor's degree is irrelevant to the present proceedings. The AAO also notes that the University of Phoenix documentation submitted to the record on appeal does not establish that the beneficiary now has a four year baccalaureate degree in management or business administration, but rather

has completed 78 credit hours and received a diploma as a result of his studies.⁵ Without further clarification, it appears the beneficiary's further academic studies would not constitute a four-year baccalaureate degree in the fields stipulated on the ETA Form 750. The AAO will comment no further on the beneficiary's additional university level studies.

To determine whether a beneficiary is eligible for an employment based immigrant visa, 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 Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of market research analyst. In the instant case, item 14 describes the requirements of the proffered position as follows:

- | | | |
|-----|-------------------------|---|
| 14. | Education | |
| | Grade School | 6 |
| | High School | 6 |
| | College | 4 |
| | College Degree Required | Bachelor |
| | Major Field of Study | Management/Business Administration |

The applicant must also have two years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A. Item 15 of Form ETA 750A did not state any further special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 11, eliciting information about schools, colleges and universities attended, including trade or vocational training, the beneficiary stated he attended Shandong Normal University, Qingdao, Changdo, China, studying English/Business Administration from September 1989 to June 1992, and received a bachelor's degree.

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 4 years of college, with a bachelor's degree in management/business administration, and two years of work experience in the proffered job.

The petitioner clearly delineated four years as the required number of years required for the bachelor's degree requirement on the Form ETA 750A. It is noted that a bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Comm. 1977). In that case, the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Matter of Shah*, 17 I&N Dec. at 245.

⁵ Further, the AAO notes that the University of Phoenix is not a regionally accredited U.S. educational institution. See http://www.phoenix.edu/about_us/accreditation.aspx.

The Form ETA 750 in the instant petition clearly states four years as the required number of years for the stipulated baccalaureate degree. Evaluating 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.” With regard to the educational equivalency document submitted to the record, [REDACTED] clearly combined the beneficiary's education, training, and progressively more responsible work experience, in reaching his determination that the beneficiary had the equivalent of a bachelor's of science degree with a dual major in business administration and English literature from an accredited U.S. institution. Thus, his evaluation does not conclude that the beneficiary has the necessary education based on his academic credentials alone.

Further, the evaluation in the record used the rule to equate three years of experience for one year of education in equating the beneficiary's five years and eight months of work experience and training to university-level training in business administration. However, that equivalence applies to non-immigrant H1B petitions, not to immigrant petitions. See 8 CFR § 214.2(h)(4)(iii)(D)(5). On appeal, counsel cites to precedent decisions, such as *Yaakov*, and *Bienkowski*, that are not relevant to the immigrant petition adjudications. Contrary to counsel's assertions, unlike the temporary non-immigrant H-1B visa category which permits equivalency evaluations that may include a combination of employment experience and education, no analogous regulatory provision exists for permanent immigrant third preference visa petitions.

The beneficiary was required to have a four-year bachelor's degree on the Form ETA 750. The AAO also notes that the petitioner did not indicate on the Form ETA 750 that the petitioner would accept a bachelor's degree or the equivalent, but rather stated the minimum requirement for the position was a four-year college degree in management/business administration, and two years of experience in the proffered position. 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.

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. The petitioner must not only prove statutory and regulatory eligibility under the category sought, but must *also* prove that the sponsored beneficiary meets the requirements of the proffered position as set forth on the labor certification application. In the instant petition, the Form ETA 750 stipulates a four-year bachelor degree in management/business administration.

Both regulatory provisions governing the two third preference visa categories clearly require that the petitioner submit evidence of the beneficiary's bachelor's degree or foreign equivalent degree – for a “professional” because the regulation requires it and for a “skilled worker” because the regulation requires that the beneficiary qualify according to the terms of the labor certification application in addition to proving a minimum of two years of employment experience.

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.

Even if the AAO were to consider the beneficiary under the skilled worker classification, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) states the following:

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.

(Emphasis added).

Thus, for petitioners seeking to qualify a beneficiary for the third preference “skilled worker” category, the petitioner must produce evidence that the beneficiary meets the “educational, training or experience, and any other requirements of the individual labor certification” as clearly directed by the plain meaning of the regulatory provision. And for the “professional category,” the beneficiary must also show evidence of a “United States baccalaureate degree or a foreign equivalent degree.” Thus, regardless of category sought, the beneficiary must have a four-year bachelor’s degree in business management or business administration.

The beneficiary was required to have a four-year bachelor’s degree in management/business administration on the Form ETA 750. Based on the beneficiary’s educational documentation, namely, his diploma from Shandong Teachers University, he does not possess a four-year bachelor degree in management or business administration, the fields stipulated on the Form ETA 750. Thus, the petitioner has not met its burden. The appeal is dismissed.

ORDER: The appeal is dismissed.