

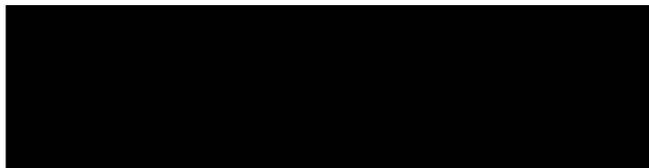
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U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
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U.S. Citizenship
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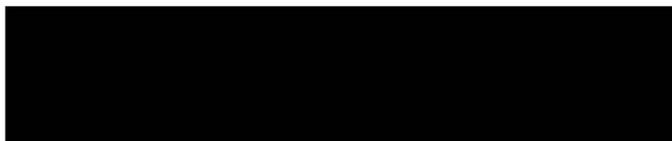
FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER
LIN 04 020 50259

Date JUN 02 2008

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 employment based immigrant visa petition was denied by Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an employee services firm. It seeks to employ the beneficiary as a technical translator. As required by statute, the petition was accompanied by certification from the Department of Labor (DOL). The director denied the petition because he determined that the petitioner failed to demonstrate that the beneficiary had the required educational credentials as stated on the approved labor certification. The director concluded that the petitioner had not established that the beneficiary was eligible for the visa classification sought.

On appeal, counsel submits additional evidence and maintains that the beneficiary has the necessary educational credentials to meet the qualifications set forth in the approved labor certification.

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).

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 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.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides employment based visa classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is May 16, 2003.

It is noted that Citizenship and Immigration Services (CIS) has authority with regard to determining an alien's qualifications for preference status and the authority to investigate the petition under section 204(b) of the Act, 8 U.S.C. § 1154(b). This authority encompasses the evaluation of the alien's credentials in relation to the minimum requirements for the job, even though a labor certification has been issued by the DOL. 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, *Madany 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 v. Coomey*, 662 F.2d 1 (1st Cir. 1981); *Denver v. Tofu Co. v. INS*, 525 F. Supp. 254 (D. Colo. 1981).

To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, 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, item(s) 14 and 15, sets forth the minimum education, training, and experience that an applicant must have for the position of a technical translator. In the instant case, item 14 states the following:

14. Education	
Grade School	8
High School	4
College	4
College Degree Required	B.S. or equivalent
Major Field of Study	Industrial Management
Experience	
Job Offered	0
Related Occupation	0
15. Other Special Requirements	n/a

The proffered position of a technical translator as set forth on the labor certification requires four years of college culminating in a bachelor of science degree or equivalent in industrial management. As reflected on the labor certification, DOL assigned the occupational title of translator and occupational code of 137-267-018 to the position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's online database at <http://online.onetcenter.org/link/summary/27-3091.00#JobZone> (accessed April 15, 2008)¹ indicates that the certified position falls within Job Zone Four requiring "considerable preparation" for the occupation type closest to the position. According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL also assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means " [m]ost of these occupations require a four-year bachelor's degree, but some do not." Further, DOL states the following concerning the training and overall experience required for these occupations:

A minimum of two to four years of work-related skill, knowledge, or experience is needed for these occupations. For example, an accountant must complete four years of college and work for several years in accounting to be considered qualified. Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.

See id.

In this case, based on the occupation, the requirements as shown on the labor certification and the DOL analysis that the normal occupational requirements do not always require a bachelor's degree but a minimum of two to four years of work-related experience, it is concluded that the proffered position is more properly analyzed as a skilled worker rather than a professional position. It is noted that the regulation at 8 C.F.R. § 204.5(l)(3)(ii) states in pertinent part:

¹ The online occupational code for translators was accessed as 27-3091.00.

(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.

On the ETA 750B, the beneficiary states that he attended Takushoku University from April 1968 to September 1970 and majored in commerce.

As proof of the beneficiary's formal education, the petitioner submitted a copy of the beneficiary's 1995 "Certificate of Academic Performance" from Takushoku University, Japan. Another certificate from this university indicates that the beneficiary attended this institution in the commerce department from April 1, 1968 to September 10, 1970, and majored in foreign trade. The petitioner also provided a copy of the beneficiary's high school graduation certificate and a copy of a certificate of employment itemizing the beneficiary's work history from February 1985 to April 1995.

The petitioner additionally provided an educational evaluation report from [REDACTED] of Foundation for International Services, Inc. (FIS), dated December 1, 1995. [REDACTED] determines that the beneficiary's attendance at Takushoku University in Tokyo represents the equivalent of two years of course work in international business at an accredited U.S. university. He further concluded that combined with the beneficiary's employment experience as summarized on the certificate of employment and a copy of the beneficiary's resume that [REDACTED] reviewed, in which he uses a formula of 3 years of experience equals 1 year of university level credit, the beneficiary has the equivalent of an individual with a bachelor's degree in industrial supervision and management from an accredited college or university in the United States.

The director denied the petition on August 3, 2005. The director reviewed the educational evaluation and records submitted but concluded that the beneficiary did not possess a four-year U.S. bachelor's degree or an equivalent foreign bachelor's degree as required by the labor certification. The director declined to accept the findings of the educational evaluation report as CIS does not accept employment experience as the educational equivalency of college or university study for the purpose of demonstrating the possession of a bachelor's degree. The director's decision to deny the petition also noted that the petition was received without evidence of the petitioner's ability to pay the proffered wage.

On appeal, counsel merely asserts that the beneficiary has met all the requirements listed in the labor certification. He adds that an equivalency is acceptable to the employer and notes that a letter from the employer has been provided. The petitioner's president, Hiroko Kitazawa, signs this letter, dated August 25, 2005. He confirms that two years of college education and experience is acceptable to qualify the beneficiary as a translator.

As a preliminary matter, it is noted that there is no evidence in the record of proceeding that the beneficiary ever enrolled in undergraduate college study beyond two years of attendance at Takushoku University. This office has also reviewed the credentials information in the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO). ACCRAO, according to its website, www.accrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals

who represent approximately 2,500 institutions in more than 30 countries.” Its mission “is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services.” According to the registration page for EDGE, <http://accraoedge.accrao.org/register/index/php>, EDGE is “a web-based resource for the evaluation of foreign educational credentials.”

In this case, as advised in the request for additional evidence sent by the AAO to the petitioner on November 8, 2007, EDGE suggests that the beneficiary’s two years of attendance at Takushoku University in Japan represents no more than two years of undergraduate study in the United States.

The record reflects that the beneficiary attended Takushoku university for two years from 1968 to 1970. It is noted that we do not find the FIS evaluation to be probative in determining whether the beneficiary’s qualifications satisfy the terms of the labor certification. 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). The FIS evaluation employed a formula of equating three years of experience for one year of education, which may be used pursuant to the regulations governing HIB non-immigrant petitions. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). Based on a review of the beneficiary’s educational qualifications, it may not be concluded that he obtained four years of college culminating in a bachelor of science degree or equivalent degree in industrial management.

We are cognizant of the decision in *Snapnames.com, Inc. v. Michael Chertoff*, CV 06-65-MO (D. Ore. November 30, 2006). In that case, the labor certification application specified an educational requirement of four years of college and a “B.S. or foreign equivalent.” The district court determined that ‘B.S. or foreign equivalent’ relates solely to the alien’s educational background, precluding consideration of the alien’s combined education and work experience. *Snapnames.com, Inc.* at *11-13. Additionally, the court determined that the word ‘equivalent’ in the employer’s educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer’s intent. *Snapnames.com, Inc.* at *14. That court, however, did find that work experience is not properly considered in determining whether the alien has a “B.S. or foreign equivalent” and is supported by the plain meaning of SnapNames’s labor certification. *Snapnames.com, Inc.* at *14. Thus [REDACTED]’s desire to accept a combination of education and experience as an acceptable substitute for a B.S. degree is not supported by the plain meaning of the labor certification in this case or by the *Snapnames* decision. See also, *Hong Video Technology*, 1998 INA 202 (BALCA 2001).

The approved labor certification requires an applicant for the position of technical translator to have four years of college and a bachelor of science degree or equivalent in Industrial management. The beneficiary does not possess these qualifications. Taken together with the inconsistent language reflected in the petitioner’s documentation of the notice of posting of this position which advised that the educational requirements of the position was a “Bachelor of Science Degree or 4 year college degree required in Industrial Management” and the newspaper advertisements reflecting the requirement of a “Bachelor of Science or equivalent in management of commerce,” it may not be concluded that either the beneficiary possesses the requisite four year bachelor of science in industrial management or a foreign equivalent degree²

² DOL has also provided the following field guidance: “When an equivalent degree or alternative work experience is acceptable, the employer must specifically state on the ETA 750, Part A as well as

or that an accurate representation of the proffered position was communicated as part of the recruitment efforts.

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 is affirmed. The record does not contain an official college or university record showing that the beneficiary possesses a U.S. baccalaureate degree in industrial management or an equivalent foreign degree as of May 15, 2003, as required by 8 C.F.R. § 204.5(l)(3)(ii)(C).

Based on the evidence submitted, the AAO concurs with the director that the petitioner has not established that the beneficiary possesses a bachelor's degree in industrial management as required by the terms of the labor certification. Therefore, the beneficiary is not eligible for the visa classification sought.

It is noted that the director observed in her denial that the petition was received without evidence of the petitioner's ability to pay the offered wage from the priority date of May 16, 2003 to the present. The certified wage set forth on the Part A of the ETA 750 is \$17.00 per hour or \$35,360 per year. The regulation at 8 C.F.R. § 204.5(g)(2) states:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by CIS.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS reviews whether the petitioner may have employed and paid the beneficiary during a given period as well as financial data that may be provided by a petitioner in the form of audited financial statements, federal tax returns or annual reports. In this matter, although Part B of the ETA 750, signed by the beneficiary on April 28, 2003, indicates that the petitioner has employed the beneficiary since September 2000, there is no evidence in the record reflecting the amount of wages paid to the beneficiary and no other evidence

throughout all phase of recruitment exactly what will be considered equivalent or alternative in order to qualify for the job." See Memo. From Anna C. Hall, Acting Regl. Adminstr., U.S. Dep't of Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep't. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994). DOL has also stated that "[w]hen the term equivalent is used in conjunction with a degree, we understand to mean the employer is willing to accept an equivalent foreign degree." See Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Joseph Thomas, INS (October 27, 1992). To our knowledge, this field guidance memoranda has not been rescinded.

supporting the petitioner's ability to pay the proposed wage offer. The record does not establish the petitioner's continuing ability to pay the proffered wage as of the priority date. A petitioner must establish the elements for the approval of the petition at the time of filing. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

It is further noted that the petitioner's name as stated on the preference petition and the ETA 750 is Towa International. N [REDACTED]'s letter of August 25, 2005 was written on the letterhead of Towa America, Inc. The online Illinois corporation records list only Towa America, Inc. If the petitioner elects to pursue future filings, its corporate status and identity must be addressed.

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.