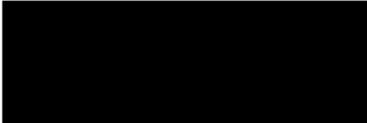




U.S. Citizenship
and Immigration
Services



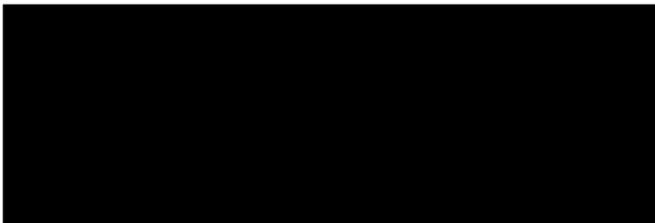
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DATE: **DEC 26 2012** Office: NEBRASKA SERVICE CENTER FILE: 

IN RE: 

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The appeal was dismissed by the Administrative Appeals Office (AAO). Counsel to the petitioner filed a motion to reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be granted, and the appeal will be dismissed on its merits. The petition remains denied.

The petitioner is a manufacturer and provider of high-tech materials. It seeks to employ the beneficiary permanently in the United States as a product development manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification. The director concluded that the beneficiary did not possess a U.S. bachelor's degree or foreign equivalent as required by the terms of the labor certification.

As set forth in the director's February 23, 2009 denial, and the AAO's June 27, 2012 decision, the issue in this case is whether the petitioner has demonstrated that the beneficiary satisfied the minimum level of education stated on the labor certification.

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.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N Dec.158 (Acting Reg'l Comm'r 1977). The priority date of the petition is March 24, 2005, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).¹ The Immigrant Petition for Alien Worker (Form I-140) was filed on May 30, 2007.

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS 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'r 1986). *See also, Madany v. Smith*, 696 F.2d 1008

¹ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

(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).

The job qualifications for the certified position of product development manager are found on Form ETA 750 Part A. Item 13 describes the job duties to be performed as follows:

Research and assess new high-tech materials for production. Develop tooling specifications, order tooling, and verify that tooling meets specifications, as well as verification of all materials orders and development of installation techniques and machine set-up for our facility in Sparta, GA. Train technicians regarding machine set-up and assist with trouble shooting of new item production.

The minimum education, training, experience and skills required to perform the duties of the offered position are set forth at Part A of the labor certification and reflects the following requirements:

Block 14:

Education (number of years)

Grade school	Blank
High school	Blank
College	4 years
College Degree Required	Bachelor's degree or equivalent*
Major Field of Study	Production management or closely related field

Training: Blank

Experience:

Job Offered (or) Related Occupation	Blank Blank
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Block 15:

Other Special Requirements - **Experience gained before, during and after will be accepted. Experience in direct screen printing on high-quality [glass] containers, plastic or ceramic required.

As set forth above, the proffered position requires 4 years of college culminating in a bachelor's degree or equivalent in production management or in a closely related field.

In support of the petitioner's claim, the labor certification states that the beneficiary possesses a

certificate in printing from Humberside College of Higher Education, Humberside, England, and he indicates that he attended the college from 1979 to 1983. The record contains a copy of the beneficiary's certificate from Humberside College of Higher Education in Humberside, England. It indicates that the beneficiary was awarded a certificate of completion in 1983, and that the field of study was printing. It is not alleged by the petitioner or counsel that the beneficiary's education alone is equivalent to a U.S. bachelor's degree or its foreign equivalent.

The record contains an evaluation, dated June 10, 2003, from [REDACTED] for the International Education Council. The evaluation indicates that based upon a review of the beneficiary's credentials, the beneficiary is a "candidate [that] has completed advanced-secondary general education studies, 4 years of post-secondary university-level studies in printing technology" from Humberside College. The evaluation stated: "based on the number of instruction/student contact hours completed (4 years of part-time studies), the subjects of instruction (printing technology), and the level of instruction (recognized English post-secondary college)," that the beneficiary's "four years of part-time studies may be considered equivalent to one year of lower-level university-level studies in printing technology toward a four-year bachelor degree at an accredited college or university in the United States (1st year of four-year degree)." The evaluation further stated that the beneficiary had completed 18 years of professional work experience in production management with a concentration in print production – three years of work experience as printer and deputy manager at Harland's of Hull Ltd, England may be considered equivalent to one year of lower-level university-level studies – six years of work experience as deputy manager, business improvement team member, and nightshift manager [REDACTED] and printing manager at Impressik may be considered equivalent to two years of upper-level university-level studies in production management with a concentration in print production toward a four-year bachelor degree from a college or university in the United States. The evaluation concludes that the beneficiary's combined general and professional education and work experience are equivalent to the education level attained by an individual who holds a bachelor of arts degree in production management with a concentration in print production issued by an accredited college or university in the United States. It is not alleged in this evaluation that the beneficiary's education alone is equivalent to a U.S. bachelor's degree. The evaluation's statements concerning the beneficiary's employment experience being the equivalent of three years of a four-year degree is unsubstantiated.

Therefore, there is no evidence in the record to demonstrate that the beneficiary received a bachelor's degree in any subject or that his certificate in printing is the equivalent to a U.S. bachelor's degree in production management or in a closely related field.

On motion, counsel asserts that USCIS erred in not properly assessing the evidence which demonstrated that the beneficiary meets the minimum education and experience required for the position. Counsel further asserts that the term "Bachelor's degree or Equivalent" and "Experience gained before, during and after will be accepted. Experience in direct screen printing on high quality glass containers, plastic or ceramic required" meant that a combination of education and experience in lieu of a degree is acceptable. However, the labor certification does not support such contention.

The petitioner submitted as evidence affidavits from the human resources manager at [REDACTED], managing director at [REDACTED], a project resource manager at [REDACTED], a human resources manager at [REDACTED], the president of [REDACTED], an executive recruiting firm, the director of professional recruiting at [REDACTED] and a former audit manager with [REDACTED] who all generally stated that language found in a job advertisement that states the job requires “a bachelor’s degree or equivalent” is language that is understood to mean that a degree is not a requirement and that a combination of education and experience is acceptable to meet the requirement of a bachelor’s degree or its equivalent. However, there is nothing in the record to demonstrate that the affiants possessed the necessary qualifications to make such determinations. Crucially, the record is devoid of evidence that the petitioner in this particular case intended for the labor certification’s terms to mean anything other than what they clearly require – four years of college and a bachelor’s degree or equivalent foreign degree.

It appears from the record that the petitioner is claiming that the beneficiary has the “equivalent” of a bachelor’s degree based on a combination of his education and work experience. However, the labor certification does not permit a lesser degree, a combination of lesser degrees, and/or a quantifiable amount of work experience, such as that possessed by the beneficiary.² The director’s Request for Evidence (RFE) permitted the petitioner to submit any evidence that it intended the labor certification to require an alternative to a U.S. bachelor’s degree or a single foreign equivalent degree, as that intent was explicitly and specifically expressed during the labor certification process to the DOL and to potentially qualified U.S. workers.³

² The DOL has provided the following field guidance: “When an equivalent degree or alternative work experience is acceptable, the employer must specifically state on the [labor certification] as well as throughout all phases of recruitment exactly what will be considered equivalent or alternative in order to qualify for the job.” [REDACTED]

[REDACTED] and JTPA Adminstrs., U.S. Dep’t. of Labor’s Empl. & Training Administration, Interpretation of “Equivalent Degree,” 2 (June 13, 1994). The DOL’s certification of job requirements stating that “a certain amount and kind of experience is the equivalent of a college degree does in no way bind [USCIS] to accept the employer’s definition.” [REDACTED]

[REDACTED] (March 9, 1993). The 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.” [REDACTED]

[REDACTED]. To our knowledge, these field guidance memoranda have not been rescinded.

³ In limited circumstances, USCIS may consider a petitioner’s intent to determine the meaning of an unclear or ambiguous term in the labor certification. However, an employer’s subjective intent may not be dispositive of the meaning of the actual minimum requirements of the offered position. *See Maramjaya v. USCIS*, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008). The best evidence of the petitioner’s intent concerning the actual minimum educational requirements of the offered position is evidence of how it expressed those requirements to the DOL during the labor certification process

The petitioner submitted its job opening notice, employment ads, and its recruitment results. These materials do not specifically indicate that the requirement of a bachelor's degree in production management could be met through an alternate requirement of education plus experience as a qualifier in its employment ads, and the beneficiary does not meet this requirement based upon the evidence in the record. Although the affiants stated that the petitioner's intent was clear in its job announcements, the petitioner does not indicate in them any specific number of years of experience that would be acceptable, in lieu of a bachelor's degree; thus, not making it clear to potential employees that the ads meant a combination of education and experience in lieu of a degree is acceptable. Although counsel asserts that the statement found in Part 15 of the Form ETA 750, "experience gained before, during and after" indicates an intent on the part of the petitioner to accept job experience as a qualifier, the petitioner failed to specify the number of years and experience required or that this would be accepted in lieu of a bachelor's degree. To the contrary, the petitioner clearly requires four years of college, which the beneficiary admittedly does not have. As noted in the International Education Council evaluation, it appears that the beneficiary attended the university on a part-time basis for four years – equating to one year of college or university studies in the United States.

The petitioner failed to establish that that the terms of the labor certification are ambiguous and that the petitioner intended the labor certification to require less than a four-year U.S. bachelor's degree, as that intent was expressed during the labor certification process to the DOL and potentially qualified U.S. workers.

Therefore, it is concluded that the terms of the labor certification require a four-year U.S. bachelor's degree in production management, or closely related field, or a foreign equivalent degree. The beneficiary does not possess such a degree. The petitioner failed to establish that the beneficiary met the minimum educational requirements of the offered position set forth on the labor certification by the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker, in that the beneficiary must meet all of the requirements of the offered position set forth on the labor certification. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

We note the decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). In that case, the labor certification 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

and not afterwards to USCIS. The timing of such evidence ensures that the stated requirements of the offered position as set forth on the labor certification are not incorrectly expanded in an effort to fit the beneficiary's credentials. Such a result would undermine Congress' intent to limit the issuance of immigrant visas in the professional and skilled worker classifications to when there are no qualified U.S. workers available to perform the offered position. *See id.* at 14.

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. In addition, the court in *Snapnames.com, Inc.* recognized that even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Id.* at 7. Thus, the court concluded that where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* See also *Maramjaya v. USCIS*, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008)(upholding USCIS interpretation that the term "bachelor's or equivalent" on the labor certification necessitated a single four-year degree).⁴

Regardless, even if the AAO were to take into consideration the beneficiary's job experience in determining his education and overall qualifications, which we will not, the evidence in the record would be insufficient to substantiate the petitioner's claim.

Evidence of qualifying experience shall be in the form of letters from former employers which include the name, address, and title of the writer and a specific description of the duties performed. If such evidence is unavailable, other documentation relating to the experience will be considered. 8 C.F.R. § 204.5(g)(1).

The petitioner submitted the following employment letters:

- A letter dated May 9, 2002 from the production manager of by Impressik who stated that the company employed the beneficiary for approximately 8 months as the afternoon shift supervisor and officially resigned as of May 10, 2002. The declarant fails to specify the beneficiary's job duties.
- A letter dated September 2, 2004 from the managing director of Harland's of Hull Ltd who stated that the company employed the beneficiary for over 11 years, and that during this period, he was a press manager for the majority of the time. The declarant also stated that the beneficiary worked on a business improvement team for 2 years. The declarant further stated that the beneficiary gained invaluable experience across the business spectrum (in

⁴ In *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005), the court concluded that USCIS "does not have the authority or expertise to impose its strained definition of 'B.A. or equivalent' on that term as set forth in the labor certification." However, the court in *Grace Korean* makes no attempt to distinguish its holding from the federal circuit court decisions cited above. Instead, as legal support for its determination, the court cites to *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)(the U.S. Postal Service has no expertise or special competence in immigration matters). *Id.* at 1179. *Tovar* is easily distinguishable from the present matter since USCIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws. See section 103(a) of the Act.

particular with regards to press operation and printing skills), and that he left the company in 2000. The declarant failed to describe the specific dates of employment and the beneficiary's specific job duties.

The declarants do not specify the beneficiary's dates of employment nor do they provide a specific description of the beneficiary's job duties. See 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). 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, which as noted above, is March 24, 2005. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petitioner has failed to establish the beneficiary's qualifications as of the priority date. For this additional reason, the petition may not be approved.

In summary, neither the terms of the approved labor certification nor the applicable regulations permit USCIS to allow the acceptance of an equivalence in the form of a combination of formal education and/or employment experience. The petitioner's request for consideration of the beneficiary as a skilled worker is not applicable as the petitioner had not established that the beneficiary met the educational requirements of the Form ETA 750.

The beneficiary does not qualify for a visa classification as both a professional under section 203(b)(3)(A)(ii) of the Act and as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act.

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 AAO's prior decision, dated June 27, 2012, is affirmed. The petition remains denied.