B6

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: [redacted] SRC 01 228 57528 Office: TEXAS SERVICE CENTER Date: JAN 29 2003

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER:

PUBLIC COPY

[redacted]

INSTRUCTIONS:
This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Helen E. Crawford for

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 Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a manufacturer and marketer of confectionary candy. It seeks to employ the beneficiary permanently in the United States as a director of design. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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 or seasonal nature, for which qualified workers are not available in the United States.

Eligibility in this matter turns on whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the labor certification as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Matter of Wing's Tea House, 16 I & N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is September 6, 2000.

A labor certification is an integral part of this petition, but the issuance of a labor certification does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the training, education, and experience specified on the labor certification as of the petition's priority date. Matter of Wing's Tea House, 16 I & N Dec. 158 (Act. Reg. Comm. 1977). Matter of Katigbak, 14 I & N Dec. 45 (Reg. Comm. 1971).

The Application for Alien Employment Certification (Form ETA 750), in block 14, detailed the minimum education, training, and experience to perform the job. It specified a four-year bachelor degree with a major in commercial or graphic arts and two years of experience in the job offered or the related occupation of art director.

The educational evaluation from the Foundation for International Service (FIS) states:

3. In summary, it is the judgment of [FIS] that Anjani

 [redacted]

> Abhyankar has the equivalent of graduation from high school plus two years of university-level credit (an associate's degree) in commercial art from an accredited community college in the United States and has, as a result of her educational program and progressively more responsible employment experiences (3 years of experience = 1 year of university-level credit), an educational background the equivalent of an individual with a bachelor's degree in commercial art from an accredited college or university in the United States.

The evaluation included the said transcript and diploma in commercial art from Nirmala Niketan Polytechnic of Maharastra State, India in the name of Anjani Lele, assumed to be the beneficiary. The petitioner submitted employment verification letters and her resume with the Form ETA 750.

The director determined that the associate degree of 1984 did not meet the minimum requirement of a bachelor's degree at the priority date of the petition, as Form ETA 750 specified. Since the beneficiary could not be found to be qualified, the director denied the petition.

On appeal, counsel argues that the beneficiary has 14 years of experience, that each three (3) equal one (1) year of university credit, and that she, therefore, has the equivalent of a bachelor's degree and the two years of experience at the priority date.

To determine whether a beneficiary is eligible for a third preference immigrant visa, the Service must ascertain whether the alien is, in fact, qualified for the certified job. The Service will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, the Service must look to the job offer portion of the labor certification to determine the required qualifications for the position. The Service 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).

The evaluation in the record used the rule to equate three years of experience for one year of education, but that equivalence applies to non-immigrant H1B petitions, not to immigrant petitions. The Form ETA 750 required the beneficiary to have a bachelor degree. 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.

Counsel, lastly, refers without publication data to a matter, said to authorize the combination of education and experience. While 8 C.F.R. 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Also, precedent decisions must be designated as such and published in bound volumes or as interim decisions. 8 C.F.R. 103.9(a).

The petitioner has not established that the beneficiary had a bachelor degree at the priority date. Therefore, the petitioner has not overcome this portion of the director's decision.

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.