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U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: LIN 02 099 51384 Office: NEBRASKA SERVICE CENTER Date: APR 19 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

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, Director
Administrative Appeals Office

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

The petitioner is a consulting and software systems development company. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the beneficiary did not possess the necessary qualifications for the position as of the priority date of the visa petition.

On appeal, counsel submits a statement but no additional documentary evidence.

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 who are members of the professions. In this case, section 14 of the labor certification application outlines the position requirements set forth by the petitioner, and states that a bachelor of science or equivalent degree in computer science, MIS, engineering, or other scientific field is required. Eligibility in this matter, therefore, hinges on whether the beneficiary possessed the necessary educational qualifications for the position as of the priority date, which was established on January 9, 2001.

With its petition, counsel for the beneficiary initially submitted a letter from the petitioner, a letter evaluating the beneficiary's educational background and work experience, copies of training certificates, and an auditor's report. Upon review of the evidence submitted, the director issued a request for evidence on August 20, 2002, requesting additional information to establish for the record that the beneficiary possessed the educational background required for the position.[1]

In response to the director's request, counsel for the petitioner submitted the following evidence:

1. Evaluation letter prepared by Foreign Credentials Evaluation, Inc.;
2. Translation and copy of Pontificia Universidade certificate with transcript;
3. Evaluation letter prepared by Foundation for International Services, Inc. (previously submitted);
4. Copies of training certificates (previously submitted); and
5. Translator's certificate.

To determine whether a beneficiary is eligible for a third preference immigrant visa, Citizenship and Immigration Services (CIS) must ascertain whether the alien is, in fact, qualified for the certified job. CIS 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, 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

[1] The previous request for evidence, issued on April 12, 2002, also required the petitioner to submit evidence establishing its ability to pay the proffered wage during the relevant period. The evidence submitted in response to that request was found to be satisfactory. Since the director did not base his decision to deny the petition upon the petitioner's financial status, the issue will not be discussed within the scope of this decision.

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 director reviewed the evidence submitted, but found it to be insufficient to establish that the beneficiary possessed the degree required for the proffered position. Consequently, the petition was denied on November 30, 2002. The director concluded that despite the evaluation letters that affirmed the beneficiary's qualifications, a combination of experience and education was not the equivalent of a bachelor degree for purposes of satisfying the petitioner's stated educational requirements for the proffered position.

On December 23, 2002, counsel for the petitioner submitted a Form I-290, Notice of Appeal to the Administrative Appeals Office, which included a one-paragraph statement outlining the basis for the appeal. On the notice, counsel further indicated that a complete brief, including supplemental evidence, would be forwarded to the AAO within 30 days. As of the date of this decision, no additional documentation has been received in this office.

The record contains evaluations from the Foundation for International Services, Inc. and Foreign Credential Evaluations, Inc., which state that the beneficiary obtained a certificate from Pontifical Catholic University of Rio de Janeiro in computer science, which is the equivalent of one year of post secondary education. The evaluations, however, conclude that as a result of progressively more responsible employment experiences, the beneficiary possesses an educational background equivalent to an individual with a bachelor of science degree in computer science from an accredited university in the United States. The petitioner has not indicated, however, that a combination of education and experience can be accepted as meeting the minimum educational requirements stated on the labor certification. In addition, the Form ETA 750 specifically requires a bachelor degree. A bachelor degree is generally found to require four (4) years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). Therefore, the combination of education and experience may not be accepted in lieu of a four-year degree.

Finally, the evaluations 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.[2] The beneficiary was clearly and expressly required to have a bachelor's degree or its equivalent on the Form ETA 750. Therefore, the combination of education and experience may not be accepted in lieu of education.

Counsel alleges, however, that the director erred in his interpretation of the word "equivalent" as set forth on the labor certification Specifically, counsel proffers that the wording "bachelor of science or equivalent" is not restricted to just an educational equivalency, but rather is intended to encompass any "equivalent," such as the combination of experience and education and/or training and education. Counsel's position is not persuasive for two reasons. First, the petitioner's actual minimum requirements could have been clarified or changed before the Form ETA 750 was certified by the Department of Labor. Specifically, the petitioner could have clearly indicated that a combination of training and/or experience, in addition to education, would be accepted. Since that was not done, the director's decision to deny the petition must be affirmed. Second, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988);

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[2] The evaluations note that the beneficiary has approximately 14-15 years of relevant experience.

Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). Counsel provides no independent evidence to support his interpretation of the word "equivalent." Consequently, this argument is rejected.

A petitioner must establish the elements for the approval of the petition at the priority date. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The labor certification required the beneficiary to have a bachelor degree or its educational equivalent in computer science, MIS, engineering, or other scientific field on January 9, 2001. The beneficiary has not met that requirement.

Accordingly, after a review of the record, it is concluded that the petitioner has not established that it had the necessary qualifications for the position.

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.