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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FEB 20 2004

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary

PETITION: 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 private country club. It seeks to employ the beneficiary permanently in the United States as a Manager, Food Services. 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.

Eligibility in this matter hinges on the beneficiary's educational qualifications for the position.

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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who, at the time of petitioning for classification under this paragraph, are professionals.

In the instant case, on the I-140 petition the petitioner checked the block corresponding to subsection 203(b)(3), which covers skilled workers, professionals and other workers. The petition form allows no opportunity for a petitioner to specify which subdivision of section 203(b)(3) is relied upon by the petitioner, and the petitioner's supporting documentation does not clarify whether classification is sought under section 203(b)(3)(A)(i) as a skilled worker or under section 203(b)(3)(A)(ii) as a professional.

In his decision the director treated the petition as one seeking classification under section 203(b)(3)(A)(ii) as a professional. The petitioner's brief takes no issue with the director's decision on that point, therefore we take as conceded that the petition seeks classification of the beneficiary under section 203(b)(3)(A)(ii) as a professional.

The ETA 750 states the minimum educational requirement for the offered position as "Bachelor's Degree/Equiv." in the field of Hotel/Restaurant Management, and makes no further statement regarding what the petitioner might consider to be equivalent to a Bachelor's Degree.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. 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. 8 C.F.R. § 204.5(d). *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). In this instance, it is April 5, 2001

Counsel initially submitted insufficient evidence of the petitioner's qualifications for the offered position. The original submission included an educational evaluation for the beneficiary. In a request for evidence (RFE) dated July 2, 2002, the director required additional evidence to establish that the beneficiary had the minimum educational and experience qualifications for the offered position.

Counsel responded to the RFE with a letter dated September 13, 2002 accompanied by documentary evidence on the beneficiary's qualifications, including two additional educational evaluations. In a decision dated December 16, 2002, the director determined that the evidence did not establish that the beneficiary had the minimum educational requirement of a bachelor's degree or a foreign equivalent degree and denied the petition.

On appeal, counsel submits a brief and evidence. The only newly-submitted evidence is a letter to the beneficiary dated September 23, 2002 from the [redacted] St. Louis, Missouri and a newspaper advertisement for the [redacted] f St. Louis, clipped from the Wall Street Journal, January 8, 2003, which contains a description of that school. The letter states that the beneficiary "is eligible for admission t[redacted] upon completing the admissions process." The letter then describes the admissions process and the school's MBA program.

Counsel offers this letter as additional evidence that the beneficiary has the equivalent of a bachelor's degree. Counsel's brief offers no explanation of why neither the above-mentioned letter nor a description of the Keller Graduate School was submitted prior to the decision of the director. Absent any such explanation, this evidence submitted for the first time on appeal is precluded from consideration by *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988). The petitioner was given reasonable notice by the RFE in the instant case of the need for evidence concerning the beneficiary's education. For this reason, the evidence submitted for the first time on appeal will not be considered for any purpose. We will therefore evaluate the director's decision based on an analysis of the evidence in the record prior to the decision of the director.

Counsel asserts on appeal that the evidence establishes that the beneficiary's studies at three separate foreign institutions of higher learning are equivalent to a U.S. bachelor's degree.

The evidence in the record shows the higher education of the beneficiary to be two years of study from 1992 to 1994 at the College of International Tourism, Sofia, Republic of Bulgaria with the receipt of a Manager of Hotel-Restaurant degree in May 1994, two academic years of study from 1994 to 1996 in Accounting and Auditing at the College of Accountancy and Auditing, University of National and World Economy, Sofia, Republic of Bulgaria, and approximately two years of study from 1996 to 1998 at the College of Hospitality Management of Griffith College, Dublin, Ireland, with the receipt of a Diploma in Hospitality Management and a Certificate in Room Division Management.

The record contains three educational evaluations by different authorities. Each of these three evaluations uses a combination of education from different institutions as the basis for finding that the beneficiary has a foreign degree equivalent to a United States bachelor's degree. The first of the three evaluations also uses the beneficiary's work experience as part of the basis for its finding.

The regulation at 8 C.F.R. §204.5(l)(2) states:

> (2) *Definitions*. As used in this part:
>
> . . .
>
> *Professional* means 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.

Counsel asserts that we should look to the regulations governing H-1B visas for guidance in interpreting the meaning of "foreign equivalent degree." *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(3) (January 1, 2003 revision), at page 311. However, the nonimmigrant regulations governing H-1B visas are not applicable to the instant immigrant petition.

The Administrative Appeals Office has previously stated that a combination of foreign degrees or diplomas fails to satisfy a regulatory requirement for a "foreign equivalent degree" concerning immigrant petitions. In considering a petition for classification as an advanced degree professional under section 203(b)(2) of the Act and section 204.5(k) of 8 C.F.R. the AAO stated:

> The requirement of "a foreign equivalent degree" indicates that the alien must possess a single degree (rather than a series of degrees) that is, standing alone, equivalent to a U.S. baccalaureate. The cited regulation is binding upon [CIS] in matters relating to immigrant classification under section 203(b)(2) of the Act, and the director has no discretion to disregard the regulatory standard in favor of some other standard that may be more conducive to the approval of the petition.

IN RE: Petitioner: [IDENTIFYING INFORMATION REDACTED BY AGENCY], AAU EAC 01 030 51820 (AAU, January 17, 2003), available on Westlaw at 2003 WL 21000270 (INS).

The same reasoning is applicable to petitions under section 203(b)(3) of the Act where a bachelor's degree is required to satisfy the definition of a professional under section 203(b)(3)(A)(ii) of the Act.

Counsel's brief asserts that requiring a single foreign degree when considering equivalence to a U.S. degree would preclude qualification of beneficiaries who have transferred from one institution to another during the course of their studies. Counsel's brief details the personal educational history of one of the co-signer's of the brief in support of this assertion.

It is inappropriate for co-counsel to base legal argument on matters from her own personal experience, unsupported by any reference to documents in the record. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Concerning transfer of credits among foreign institutions, nothing in our decision in the instant case nor in previous decisions limits the eligibility for classification under sections 203(b)(2) or (b)(3) of the Act of beneficiaries who have earned a foreign degree in part through the use of transfer credits, where the foreign degree-granting institution has accepted such credits in partial fulfillment of its own requirements for granting a degree. But we reaffirm our prior rulings that in immigrant petitions a combination of foreign diplomas or foreign degrees, none of which are individually equivalent to a United States bachelor's degree, fails to satisfy a regulatory requirement for a "foreign equivalent degree."

Counsel asserts that letters to the beneficiary from two United States graduate schools to which the beneficiary has applied for admission show that each school has recognized the beneficiary's foreign education as equivalent to a United States bachelor's degree. But the first of those letters, from the University of St. Louis, is merely an acknowledgement of the beneficiary's application for admission. The second letter is the one from the Keller Graduate School of Admission submitted for the first time on appeal, which for the reasons discussed above, is not being considered in adjudicating this appeal and which, in any event, is not a letter accepting the beneficiary to that institution.

Counsel submits as a supplement to the petitioner's brief a copy of a letter to a lawyer who is not a representative in the instant case dated January 4, 2003 from Efren Hernandez III, Director, Business and Trade Services, Office of Adjudications, Immigration and Naturalization Service. In the letter Mr. Hernandez states concerning 8 C.F.R. § 204.5(k)(2) that it is not the intent of the regulations that a "foreign equivalent degree" be only a single foreign degree and that if a proper credentials evaluations service finds that "the foreign degree or degrees are the equivalent of the required US degree, then the requirement may be met."

Letters and correspondence issued by the Office of Adjudications are not binding on the AAO. Letters written by the Office of Adjudications do not constitute official CIS policy and will not be considered as such in the adjudication of petitions or applications. Although a letter may be useful as an aid in interpreting the law, such letters are not binding on any CIS officer as they merely indicate the writer's analysis of an issue.

See Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000).

In summary, the controlling issue in the instant case is whether the beneficiary met the minimum educational stated by the petitioner in block #14 of the labor certification as of the day it was filed with the Department of Labor. The petitioner has not established that the beneficiary had a Bachelor's degree in Hotel/Restaurant Management on April 5, 2001. Therefore, the petitioner has not overcome this portion of the director's decision.

Beyond the decision of the director, the ETA 750 required four years of experience in the offered position. Applicant's documentation includes letters from three hotels where he worked between September 1996 and October 1999. None of the beneficiary's positions bore the job title of Manager, Food Services. Nor do the letters from each of those three hotels contain descriptions of the beneficiary's duties which show similarity to the duties required in the offered position. Therefore, even assuming that the beneficiary's educational qualifications met the minimum requirement for the position, the evidence also fails to establish that the beneficiary met the minimum work experience requirement 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.