U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, D.C. 20536

[redacted]

MAR 0 2 2004

File: WAC 99 200 50945 Office: California Service Center Date:

IN RE: Petitioner:
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: [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 Citizenship and Immigration Services (CIS) 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.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is an integrated circuit manufacturer. It seeks to employ the beneficiary permanently in the United States as a product marketing manager. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that the petitioner has the degree which the Form ETA 750 states the proffered position requires.

On appeal, counsel stated that experience may be substituted for the requirement of a bachelor's degree.

Section 203(b)(3)(A)(ii) 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 hold baccalaureate degrees and are members of the professions.

Eligibility in this matter hinges on the petitioner demonstrating that the beneficiary has the education and experience which the Form ETA 750 states are required by the proffered position. The Form ETA 750 clearly states that the position requires five years of experience in business development or product management experience in the PC Entertainment Software Industry and a bachelor's degree in computer science, marketing, or marketing management.

With the petition, counsel submitted a copy of the beneficiary's résumé. That résumé states that the beneficiary received a bachelor of arts in business communications from Georgian College in Ontario, Canada. Counsel submitted the petitioner's transcript from the Georgian College of Applied Arts and Technology in Ontario. That transcript does not show that the beneficiary has a bachelor's degree. Further, counsel submitted a Certificate of Achievement in Advanced Marketing Studies awarded to the beneficiary by Humber College of Applied Arts and Technology.

With the transcript, counsel submitted an educational evaluation which stated that the beneficiary's education is the equivalent of an associate's degree in business, rather than a bachelor's degree.

In a letter, dated July 8, 1999, which accompanied the petition and supporting documentation, counsel stated that,

> The enclosed I-140 visa petition requests that the alien be classified as a (sic) employment-based third preference immigrant under Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act.

Counsel acknowledged that a petition under that section is available to qualified immigrants who hold baccalaureate degrees and who are members of the professions and asserted that the petitioner's education is the equivalent of a bachelor's degree in marketing management.

Because the evidence submitted did not demonstrate that the beneficiary has the requisite degree, the California Service Center, on January 30, 2001, requested additional evidence. In response, counsel submitted additional copies of the beneficiary's university transcripts.

On December 28, 2001, the Acting Director, California Service Center, issued a Notice of Intent to Deny in this matter. The Acting Director noted that 8 C.F.R. 204.5(a)(3)(ii)(C) states, in pertinent part,

> If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree . . . .

and further that,

> Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of study.

The Acting Director noted that the evidence submitted appeared to indicate that the beneficiary had no such degree and that, absent evidence to the contrary, he would deny the petition.

In response, counsel submitted a letter from the petitioner's Visa Administrator dated February 8, 1999. That letter states that "in lieu of a Bachelor's Degree, [the petitioner] Will Accept Seven Years of Work Experience." (Caps in the original.) Elsewhere, that letter states that,

> In lieu of a Bachelor's degree plus five years of experience in the PC entertainment software industry, (the petitioner) will accept seven years of work experience in (business development or product

> management . . . in the PC entertainment software industry.)

In a cover letter, dated January 24, 2002, counsel stated that the letter of February 8, 1999 accompanied the Form ETA 750. An affidavit from the petitioner's Visa Administrator, dated January 23, 2002, also states that seven years of experience may be substituted for the requirements on the Form ETA 750, that this was stipulated in supporting documents which accompanied the Form ETA 750 to the Department of Labor, and that the company has always considered seven years experience an appropriate substitute for five years of experience and a baccalaureate degree.

On May 16, 2002, the Director, California Service Center, denied the petition. The director noted that the record contains no evidence that the Form ETA 750 was modified or altered, and that it clearly states that the proffered position requires a bachelor's degree, which the petitioner has not demonstrated that the beneficiary has. The director further noted that counsel, in the initial submission, made explicit that the petition was for a professional, and that the regulations make no allowance for experience equivalent to the bachelor's degree required for approval of such petitions.

On appeal, counsel states,

> [CIS] erred in denying the I-140 immigrant visa petition in failing to consider the alternative qualification of 7 years of experience. [CIS] should have processed the I-140 as a petition for EITHER a skilled worker OR professional. Instead, [CIS] only considered the petition as one for a professional, ignoring the alternative language as set forth in the labor certification package filed with the EDD/DOL.

The approved Form ETA 750 which counsel submitted with the petition indicates that the proffered position requires a bachelor's degree and five years of experience. Nothing on that form indicates that seven years experience, or any other amount of experience, might be substituted for the requisite degree. Counsel submitted no extrinsic evidence with the petition and Form ETA 750 to indicate that the Department of Labor approved any qualifications other than those stated on that Form ETA 750.

In the initial submissions, counsel made explicit that the petition was for a professional, and stated that the beneficiary's education is the equivalent of a bachelor's degree. Pursuant to 8 C.F.R. § 204.5(l)(3)(C), however, a petition for a professional may only be filled by a beneficiary with a United States

baccalaureate degree or a foreign equivalent degree. The beneficiary has no such degree.

Now counsel and the petitioner have shifted ground. They have provided evidence that the qualifications for the proffered position are not necessarily those stated on the Form ETA 750, but rather that the requirements of the petition may be satisfied by the alternative requirements contained in the letter of February 8, 1999, which counsel submitted, not with the initial submissions, but in response to the Notice of Intent to Deny. The Form ETA 750 makes no reference to that letter and the evidence is insufficient that the Department of Labor, when it approved the Form ETA 750, approved any qualifications as a substitute for the qualifications clearly stated on that document. Neither the petitioner nor this office is able to amend the requirements stated on an approved labor certification in order to render a petition approvable. The petitioner has not demonstrated that the beneficiary has the requisite education shown on the labor certification. Therefore, the petition may not be approved.

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.