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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

B6

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

MAR 0 2 2004

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

IN RE: Petitioner:
Beneficiary: [redacted]

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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software and information systems firm. It seeks to employ the beneficiary permanently in the United States as a systems analyst/programmer. 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.

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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). *See* 8 C.F.R. § 204.5(d). In this instance, the petition's priority date is August 6, 1998.

Eligibility in this matter hinges on whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date.

The petition on appeal is the third I-140 petition filed by this petitioner on behalf of the same beneficiary. The first petition was filed on January 2, 2001 under the advanced degree professional category. That petition was denied on November 19, 2001. The second petition was filed on December 11, 2001 under the skilled worker/professional category. That petition was denied on June 19, 2002 and a motion to reopen or reconsider was denied on August 6, 2002. Shortly after the second petition was filed, the third petition was filed on December 21, 2001 under the skilled worker/professional category. That petition was denied on December 3, 2002. The denial of the third petition is the basis of the instant appeal.

The repeated filings under two different employment-based categories have failed to address the underlying problem of the beneficiary's inability to satisfy the minimum job requirements stated on the ETA 750. The ETA required a master's degree, or in the alternative, a bachelor's degree plus experience. But according to the evidence in the record, the beneficiary does not have a bachelor's degree, nor does he have a foreign degree which is equivalent to a U.S. bachelor's degree. Notwithstanding counsel's argument to the contrary, the regulations governing immigrant petitions do not allow for work experience to be combined with a lower level of foreign education to qualify as the equivalent of a U.S. bachelor's degree.

The procedural history of the case is as follows.

The Form ETA 750 filed on August 6, 1998 indicated that the position of systems analyst/programmer required a Master of Science degree and three years of experience in the related occupation of software engineer, analyst/programmer. The Form ETA 750 also stated that a Bachelor of Science and five years experience may be substituted for a Master of Science and two years experience.

Following approval of the ETA 750 by the Department of Labor on October 30, 2000, the petitioner filed an I-140 petition on January 2, 2001. On Part 2, Petition Type, the petitioner checked the block beside letter "d.," for "A member of the professions holding an advanced degree or an alien of exceptional ability." The file number assigned to this petition was WAC-01-077-55812.

In response to a Notice of Intent to Deny (NOID) dated June 16, 2001 counsel submitted a letter dated July 16, 2001 in which counsel stated that the I-140 petition had been incorrectly completed, and that it should have been filed under the EB-3 category, as a skilled or professional worker. Counsel's letter stated that a corrected I-140 petition and filing fee was enclosed.

CIS returned the petitioner's amended I-140 to counsel with a cover letter dated August 8, 2001 which stated the reason for the return as, "This petition is not needed at this time. Your application and remittance is being returned to you." The petition as originally filed was then denied on November 19, 2001. No appeal was taken from that decision.

Counsel submitted a letter dated December 3, 2001, along with the amended I-140 and fee which had been returned to counsel in August 2001. On Part 2, Petition Type, the petitioner checked the block beside letter "e.," for "A skilled worker (requiring at least two years of specialized training or experience) or professional." Counsel requested that the petition be "reconsidered under the correct category" under Section 203(b)(3) of the Act as a skilled worker. The amended petition was received by CIS on December 11, 2001 and was assigned the file number WAC-02-063-51619.

Shortly after the second I-140 petition was filed, counsel filed a third I-140 petition. The block checked in Part 2, Petition Type, was the same one which had been checked on the second I-140 petition, the block beside letter "e.," for "A skilled worker (requiring at least two years of specialized training or experience) or professional." This petition was received by CIS on December 21, 2001 and was assigned the file number WAC-02-074-52067

The second and third petitions were pending concurrently, so the procedural events overlapped for the two petitions.

Concerning the second I-140 petition, the director issued a Request for Evidence (RFE) dated March 7, 2002, to which the petitioner responded with a letter dated May 21, 2002 and additional evidence. The second I-140 petition was denied on June 19, 2002. Counsel filed a motion to reopen or reconsider on June 27, 2002. That motion was denied by the director on August 6, 2002. No appeal was taken from the decision or from the denial of the motion to reopen or reconsider.

Concerning the third I-140 petition, the director issued a Request for Evidence (RFE) dated June 24, 2002. That RFE noted that two previous petitions had been filed and asked for verification that the petitioner wished to continue with adjudication of the third I-140 petition. The RFE stated that if so, the petitioner must submit additional evidence of the petitioner's ability to pay the proffered wage and of the beneficiary's education or training as listed on the ETA 750.

The petitioner responded to the RFE by a letter on the petitioner's own letterhead dated September 10, 2002, signed by [redacted] Business Analyst. The letter affirmed that the petitioner wished to continue with the adjudication of the third I-140 petition, seeking classification of the beneficiary as a skilled worker. Submitted with the letter were copies of the petitioner's corporate tax returns for fiscal years 1998, 1999 and 2000. The letter stated that an extension had been requested for the 2001 return, which had not yet been filed. Also submitted were transcripts of the beneficiary's foreign educational studies.

The third I-140 petition was denied by the director in a decision dated December 3, 2002. The director's decision acknowledged receipt of tax returns and W-2 forms, but made no further analysis of the petitioner's ability to pay the proffered wage. Concerning the beneficiary's qualifications the director found that the petitioner had failed to establish that the beneficiary possessed the minimum educational requirements stated on the ETA 750.

Counsel filed a timely notice of appeal on January 3, 2002.

On appeal, counsel submits a brief as an attachment to the Notice of Appeal and submits no additional evidence.

In his brief counsel states that the Form ETA 750 requires a masters degree or the equivalent plus three years experience and argues that the Form ETA 750 neither limits the master degree "equivalent" to a foreign equivalent degree nor restricts alternate ways of meeting the requirement for the equivalent of a master's degree. Counsel's assertion on this point, however, is not consistent with the entries made by the petitioner on the ETA 750. In block 14 of the ETA 750 the required education is listed as "Master of Science or the equivalent*." In the bottom of block 15 appears the entry "*Bachelor of Science and five years experience may be substituted for a Master of Science and two years experience." Contrary to counsel's assertion, the asterisk leading to the entry in the bottom of block 15 does restrict the acceptable equivalent to the Master of Science requirement to that shown in the bottom of block 15.

Counsel asserts that the evaluation in evidence "by a recognized expert" establishes that the beneficiary's combination of education and experience is equivalent to a master's degree. Counsel's assertion is a reference to an evaluation report by Foundation for International Services, Inc. dated November 30, 2001. An earlier evaluation report by the same company had been submitted in support of the petitioner's first I-140 petition. Copies of the November 30, 2001 report were submitted by the petitioner in support of its second and third I-140 petitions.

The November 30, 2001 evaluation report finds that that the Diploma and two Post-Diplomas earned by the beneficiary in India were equivalent to four years of university-level credit from an accredited community college in the United States. The evaluation also finds that the beneficiary has 9 ¾ years of relevant progressive employment experience. Using a formula of (3 years experience = 1 year of university-level credit) the report finds that beneficiary has the equivalent of a bachelor's degree in computer science from an accredited college or university in the United States. The report then finds that the beneficiary has the equivalent of a master's degree in computer science from an accredited college or university in the United States, based on having the equivalent of a bachelor's degree followed by at least five years of progressive experience in the specialty.

Counsel's assertion that CIS should defer to the finding "by a recognized expert" overlooks the fact that the evaluation report itself relies on a formula found in immigration regulations. As the director's decision correctly noted, the formula (3 years experience = 1 year of university-level credit) is found only in a regulation pertaining to H-1B nonimmigrant visas, 8 C.F.R. § 204.2(h)(4)(iii)(D)(5), but that formula does not apply to immigrant visa petitions.

With regard to immigrant petitions, the authority for finding foreign degrees equivalent to degrees at U.S. colleges and universities is found in 8 C.F.R. § 204.5. Subsection (k) of that regulation pertains to aliens who are members of the professions holding advanced degrees and aliens of exceptional ability, the categories covered by section 203(b)(2) of the Act. Subsection (l) pertains to skilled workers, professionals and other workers, the categories covered by section 203(b)(3) of the Act. In the latter subsection the reference to foreign degrees which are equivalent to United States baccalaureate degrees is found in the definition of "professional."

Neither of those subsections allows for work experience to be combined with education to establish that a foreign degree is equivalent to a U.S. degree.

The petitioner seeks to classify the beneficiary under subsection 203(b)(3) of the Act. Counsel asserts that the applicable clause is subsection 203(b)(3)(i), for skilled workers, not subsection 203(b)(3)(ii) for professionals. Yet for skilled workers no regulatory authority permits foreign degrees to be considered as equivalent to United States bachelor's degrees. That authority for subsection 203(b)(3) is found only in the definition of "professional" mentioned above, in 8 C.F.R. § 204.5(l).

The ETA 750 itself contains no reference to foreign education and experience being considered equivalent to the requirements specified in blocks 14 and 15, which state that the beneficiary must hold either a master of science degree or a bachelor of science degree. The statement in block 15 that "*Bachelor of Science and five years experience may be substituted for a Master of Science and two years experience" contains no reference to any other qualifications which would be considered equivalent to a Bachelor of Science degree.

Counsel also argues that the Department of Labor has accepted the petitioner's proposed alternative method of meeting the requirement for the position, that the beneficiary has demonstrated that he meets the alternate requirements, and that therefore I-140 petition must be approved, citing *Matter of* [name not provided] EAC 94 103 50831 (Sept. 23, 1994)(AAO).

The case cited by counsel can be found in the Westlaw database at 2000 WL 33538942. The case concerns a trainee under section 101(a)(15)(H)(iii) of the Act. The decision makes no reference to any labor certification or to any other decision by the Department of Labor and the case does not appear to be relevant to any issue in the instant appeal.

In the instant case, the Department of Labor's approval of the ETA 750 does not imply an approval of any alternative means for a beneficiary to satisfy the minimum requirements stated on that form. Moreover the authority to evaluate whether the beneficiary meets the minimum requirements stated on the ETA 750 rests with CIS, not with the Department of Labor. *Matter of Wing's Tea House, supra. See Ubeda v. Palmer*, 439 F. Supp. 647 (N.D. IL., 1982). *See also* 8 C.F.R. §§ 204.5(a), (b), (g), and (l).

It should be noted that various documents in the file show differing versions of the beneficiary's name and that the record lacks evidence to clarify this issue.

The director's decision did not address the petitioner's ability to pay the proffered wage. The evidence indicates that the beneficiary has been employed by the petitioner since the priority date at salaries averaging higher than the proffered wage, but the evidence also indicates that the petitioner experienced significant financial losses in fiscal years 2000 and 2001. Since this appeal is being dismissed on other grounds, no decision is made here concerning the petitioner's continuing ability to pay the proffered wage.

In summary, the petitioner's actions of filing amended I-140 petitions under section 203(b)(3) in place of the initial petition under section 203(b)(2) did not cure the underlying problem of the beneficiary's inability to satisfy the minimum job requirements stated on the ETA 750. Although the beneficiary has education and experience sufficient to qualify him as a skilled worker, the requirements on the ETA 750 were higher than those for a skilled worker. The ETA required a master's degree, or in the alternative, a bachelor's degree plus experience. But according to the evidence in the record, the beneficiary does not have a bachelor's degree, nor does he have a foreign degree which is equivalent to a U.S. bachelor's degree.

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.