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U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 02 117 50114 Office: CALIFORNIA SERVICE CENTER Date: MAR 04 2004

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 provides and services bar code equipment. It seeks to employ the beneficiary permanently in the United States as an international sales manager. 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 (skilled workers). Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii) accords preference classification, also, to qualified immigrants who hold baccalaureate degrees and who are members of the professions (professionals).

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, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(d). The petition's priority date in this instance is June 6, 2001.

In a notice of intent to deny (NOID) dated April 11, 2002, the director observed that the Form ETA 750 exacted a baccalaureate degree and that no provision authorized the substitution of the beneficiary's experience, though almost 30 years, instead of a degree. The director relied on 8 C.F.R. § 204.5(l)(3)(ii)(C), *Professionals*.

In response to the NOID, counsel contended that Citizenship and Immigration Services (CIS), formerly the Service or INS, must, in addition, consider whether the beneficiary established eligibility as a skilled worker. The brief, dated May 9, 2002, stated, with detail:

> 2. . . . The facts of this case demonstrate that the [petitioner] has repeatedly and consistently indicated that it would accept work experience as acceptable experience in lieu of a degree. These representations have been made both to the U.S. Department of Labor (in securing the underlying [Form ETA 750]) and to [CIS] in filing [the petitioner's I-140] on behalf of the [beneficiary]. . . .
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> b. . . . It is clear that this case can be distinguished from those situations where the employer failed to include any reference to considering the qualifications of those other than graduates of formal degreed programs. This case can be distinguished from others where employers made no reference to equivalency or the consideration of work experience in lieu of formal academic training. . . . In contrast to the statements made by [CIS] in its NOID, [the petitioner] did not limit its requirements only to those who have a formal degree.
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> . . . . Accordingly, when the record is reviewed as a whole, we trust that [CIS] will recognize that there is extensive factual and documentary evidence to support having this petition considered in the Skilled Worker category.

In a notice of decision (NOD) dated June 5, 2002, the director observed that the petitioner might have clarified item 14, in Part A of the Form ETA 750, if it intended to effect prior experience instead of a degree. The NOD considered, also, that the Foundation for International Services, Inc (FIS) inaptly applied the rule of three (3) years of experience for one of education, typical of the evaluation of H1B, nonimmigrant petitions. The director concluded, again, that the beneficiary was not a professional, and denied the petition.

The petitioner appealed and filed a brief on July 8, 2002. Counsel correctly states that the professional and skilled workers comprise a single visa category and that the AAO considers them together. Counsel charges error in that the director defined the degree requirement by the definition of the professional in 8 C.F.R. § 204.5(l)(3)(ii)(C), *Professionals*. It defines a degree as a United States baccalaureate or a foreign equivalent degree. As Form ETA 750 requires a bachelor degree and four (4) years of education, the combination of education and experience may not be accepted instead. *See also, Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977).

The Form ETA 750, in block 14, separately states education, training, and experience. In the petitioner's case, it exacted, for education, four (4) years of college, a bachelor degree or equivalent, and a major field of study in manufacturing engineering or related. Block 14 made no entry for training. It recorded, for experience, 0 (zero). The Form ETA 750, in the petitioner's case, omits training and experience. The Form ETA 750 reveals no basis to evaluate the equivalent of a degree. The petitioner has neither a United States, nor a foreign equivalent, degree.

Counsel urges the consideration of the matter in the skilled worker category, but that does not change the result. If, as counsel advocates, the professional and the skilled worker describe one category, the definition of a degree would be the same for both. The petitioner must satisfy Form ETA 750 and demonstrate the bachelor degree and four (4) years of education. To determine whether a beneficiary is eligible for a third preference immigrant visa, 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 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 petitioner asserts that the job opportunity clearly requires more than two (2) years of experience and that the beneficiary has nearly 30. Counsel emphasizes that the proceedings are replete with the petitioner's expressions of satisfaction with experience as the equivalent of the degree. The Form ETA 750, however, records no measure for the equivalent experience, but 0 (zero), in Part A at blocks 14 and 15. The degree requirement remains and is not satisfied. The AAO may not disregard it.

Relevant post-secondary education may be considered for purposes of training under the definition of a skilled worker. *See* 8 C.F.R. § 204.5(l)(2). The petitioner's Form ETA 750, however, makes no entry as to training.

Counsel cites unreported decisions of the AAO said to amply support the approval of this petition. One concerns studies short of a degree, but the petitioner wishes to substitute experience. Counsel urges that they used the definition of "professionals." In truth, the petitioner's burden of proof depends on compliance with the Form ETA 750 and with authorities defining a United States, or foreign equivalent, degree.

While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel's brief of May 9, 2002, at 6, cites unreported cases to avert the consequences of the lack of any provision, in the Form ETA 750, for the statutory two (2) years of work experience for beneficiaries in the skilled worker category.

The brief contends that:

> [B]ecause they had qualifications that demonstrated at least an equivalency with a degree and had other relevant work experience, the AAO determined that the cases must be considered in the alternative [under the skilled worker subsection] of the law. . . . The AAO recognized that an individual would need far in excess of two years of training or experience to meet the employers' requirements for the job. As such the I-140 Petitions were approved and the Beneficiaries were deemed qualified as Skilled Workers.

These unreported cases provide no authority for this standard of review. They do not permit the AAO to go behind the record of the Form ETA 750 with the explicit purpose of altering what it means.

FIS advised that the beneficiary has an educational background the equivalent of a bachelor degree in manufacturing technologies from an accredited college or university in the United States. It considered three (3) years of employment experience as equal to one year of university level credit. The Form ETA 750 does not mention training or experience or indicate that a combination of education and experience can be accepted as meeting the minimum educational requirements stated on the labor certification. Therefore, the combination of education and experience may not be accepted in lieu of education.

Further, the rule to equate three years of experience to one year of education applies to non-immigrant H1B petitions, not to immigrant petitions. The Form ETA 750 exacted a bachelor degree, or equivalent foreign 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.

Educational evaluations have their own disclaimers to the effect that they are advisory opinions only. The director did not err in rejecting this one. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

The issue is whether the beneficiary met all of the requirements stated by the petitioner in block 14 of Part A of the Form ETA 750 at the priority date. The petitioner has not established that the beneficiary had a bachelor degree in manufacturing engineering or related, or an equivalent foreign degree. 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.