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U.S. Department of Homeland Security
Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
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Washington, D.C. 20536

[redacted]

B6

MAR 17 2004

File: LIN 02 232 50861 Office: Nebraska Service Center Date:

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

The petitioner is a specialty chemical manufacturer. It seeks to employ the beneficiary permanently in the United States as an accounting manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL), accompanies the petition. The director determined that that the position is that of a professional and therefore experience cannot be substituted for a degree.

On appeal, counsel argues that the director abused his discretion in denying the petition.

With the petition counsel submitted an ETA 750 indicating the proffered position required a bachelor's degree or its equivalent and three years minimum experience in manufacturing. The priority date of the petition is October 9, 2001, the date the ETA 750 was accepted for processing by the Department of Labor. The ETA 750 was approved on June 11, 2002. Counsel also submitted a letter from the beneficiary's previous employer indicating the beneficiary began working for the company in its accounting and finance department in December 1983 as a budget and inventory analyst and worked his way up to accounting manager in 1992, before leaving the company in 1997. Counsel submitted an evaluation from the Foundation for International Services, Inc. in which the evaluator equated the beneficiary's work experience to that of a bachelor's degree from an accredited U.S. educational institution.

Section 203(b)(3) of the Immigration and Nationality Act (the Act) states, in pertinent part:

> (A) In general. - Visas shall be made available . . . to the following classes of aliens who are not described in paragraph (2):
>
> (i) SKILLED WORKERS. - Qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

(ii) PROFESSIONALS. - Qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

> (B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification.

The same regulation at sub-paragraph (C) states, in pertinent part:

> (C) *Professionals*. 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 by evidence that the alien is a member of the professions.

Furthermore, the beneficiary must have all of the training, education, and experience specified on the labor certification as of the date that the request for labor certification was accepted for processing by DOL. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

In a request for evidence (RFE) dated September 5, 2002, the director requested evidence that the beneficiary possessed a bachelor's degree in accounting or its equivalent, and met the minimum experience requirement. In response, counsel submitted an amended ETA 750 (amendment approved by DOL) indicating that the bachelor's degree equivalent could be satisfied by work experience.

In a second RFE dated December 27, 2002, the director rejected the evaluator's determination because it was based on the beneficiary's résumé. He also requested information indicating that the beneficiary's experience was in manufacturing, as required by the ETA 750. In response, counsel submitted a revised evaluation based on the previously submitted employer's statement. The evaluator determined that the beneficiary met the educational requirement. Counsel also submitted a statement from the previous employer that it had been engaged in textile manufacturing for 50 years.

The director determined that by indicating on the ETA 750 that a bachelor's degree was required, the petitioner identified the position as a professional and did not submit evidence that the beneficiary had the necessary qualifications. The director also determined that the amended ETA 750 was unacceptable because the petition "must be adjudicated as initially submitted; there is no provision for making material changes in an application or petition after its filing."

On appeal, counsel states the proffered position required a bachelor's degree or equivalent based on education or experience, and that the beneficiary qualified for the position based on experience.

The director's determination that the petition can only be considered under section 203(b)(3)(ii) is overly restrictive. The I-140, as annotated, and counsel's accompanying letter indicate that the petition was filed in behalf of the beneficiary as either a professional or skilled worker. While it is true that a petition for a professional must be accompanied by evidence that the beneficiary has a United States baccalaureate or foreign equivalent degree, there is nothing to preclude consideration of a beneficiary as a skilled worker where degree equivalency is through experience or a combination of education and experience.

The director's determination that the petition must be adjudicated as initially submitted is again an overly restrictive interpretation of the regulation and his determination that an amended ETA 750 cannot be accepted is erroneous. The amendment to the ETA 750 clarified what the petitioner meant by "equivalent" as an alternative to a Bachelor's in Accounting; it was approved by DOL; this action did not change the priority date. There had been no change so significant or material that it would invalidate the I-140 as originally filed. The beneficiary met the educational or experience requirements as of the date of the filing of the ETA 750.

In review, it is determined that the petitioner has provided sufficient evidence to overcome the findings of the director in his decision to deny the petition. The petitioner has established eligibility pursuant to section 203(b)(3)(A)(i) of the Act, and the appeal will be sustained.

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 met that burden.

ORDER: The appeal is sustained.