U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

POWERFOOD INC
7031 EISENMAN ROAD
BOISE ID 83706

File: A75 307 414 Office: NEBRASKA SERVICE CENTER Date: JUN 30 1997

IN RE: Petitioner: POWERFOOD INC
Beneficiary: JOHANN WALTER

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

E31 / "Dismissed / il Equivalency"

IN BEHALF OF PETITIONER:

JO AMANDA COVEY
703 MARKET ST STE 1900
SAN FRANCISCO CA 94103

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which 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 which 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 the Service 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 which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Edward H. Skerrett, Acting Director
Administrative Appeals Unit

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a company which manufactures and sells food products. It seeks to employ the beneficiary permanently as a plant maintenance supervisor. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary met the petitioner's qualifications for the position as stated in the labor certification.

§ 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 153(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.

§ 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

§ 204(b) of the Act (8 U.S.C. 1154(b)) states a petition may be approved if it is found all facts in the petition are true and eligibility is established. A labor certification is an integral part of this petition, but the issuance of a labor certification does not mandate the approval of the relating petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). To be eligible for approval, a beneficiary must have all the training, education, and experience specified on the labor certification as of the petition's filing date. Here, the petition's filing date is November 6, 1995.

The Application for Alien Employment Certification (Form ETA 750) indicated that the position of plant maintenance supervisor required a Bachelor of Science degree in Mechanical Engineering Technology or ~~the equivalent~~ and five years of experience in the ~~job offered, such experience~~ to include mechanical journeyman's certificate, knowledge of electrical, electronic, pneumatic, and hydraulic production systems. The record shows that the beneficiary completed junior high school and received a certificate of completion of an apprentice program from the Audi NSI Auto Union.

The director determined that the beneficiary did not meet the educational requirement stated on the ETA-750 and denied the petition.

On appeal, counsel states:

> The Center Director has narrowly construed "or equiv" to mean "or equivalent field of study." Such an interpretation is unreasonably exclusive and contrary to the ordinary parlance and expectations of employers and applicants in the labor market. The ordinary understanding of "or equiv" in job announcements is that a combination of training and/or experience may be substituted for the desired level of education. The employer does not spell out a formula of "equivalence" in the Form ETA-750, but in fact entertained applications from all interested candidates for the position.

Counsel's argument is not persuasive. In a letter dated March 9, 1993, Paul R. Nelson, Certifying Officer, U.S. Department of Labor, states, in pertinent part:

> Heretofore we have understood the term equivalent...to mean an equivalent foreign degree. Our national office has recently determined that the employer has the responsibility to define what is meant by the term equivalent. Thus equivalent may be defined by the employer to mean either education, experience, or a combination of the two. For applications that are currently in process at either our level or the SESA level, we will continue to treat them as if the word equivalent meant equivalent foreign education...We will review employer definitions of equivalency on a case by case basis for compliance with the regulations concerning restrictive requirements and actual minimum requirements. In addition, our issuance of a labor certification where the employer has stated that a certain amount and kind of experience is the equivalent of a college degree does in no way bind INS to accept the employer's definition.

In the instant case, the petitioner listed the term equivalent on the ETA-750, however, the petitioner failed to define what was meant by the term equivalent. Counsel further states:

> The beneficiary qualifies as a professional based on over 12 years of training and progressive employment experience in his field. as further evidenced by the evaluation of a recognized evaluation service.

On appeal, counsel argues that "experience alone may be sufficient to qualify an alien as a professional." Counsel cites regulations pertaining to temporary workers in support of this position. The issue here is not whether the beneficiary is a professional, but whether the beneficiary had the degree required as of the filing date of the labor certification.

Counsel argues that regulations for H-1B classification state that a person may qualify on experience alone. However, the eligibility requirements for H-1B are not the same as those in this proceeding.

The petitioner has not established that the beneficiary met the minimum requirements as set forth by the petitioner on the Form ETA 750, Application for Alien Employment Certification.

The burden of proof in these proceedings rests solely with the petitioner. § 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden. Accordingly, the decision of the director will not be disturbed and the appeal will be dismissed.

ORDER: The appeal is dismissed.

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