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U.S. Department of Justice

Immigration and Naturalization Service

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



File: [Redacted] Office: Nebraska Service Center

Date: APR 29 2002

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

IN BEHALF OF PETITIONER:



PUBLIC COPY

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 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 that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant 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 provider of financial software solutions and services. It seeks to employ the beneficiary permanently in the United States as a systems analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(2). As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the beneficiary does not meet the job requirements set forth on the labor certification.

On appeal, counsel maintains that the beneficiary meets the requirements on the labor certification.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a U.S. academic or professional degree or a foreign equivalent degree above the baccalaureate level. The equivalent of an advanced degree is either a U.S. baccalaureate or foreign equivalent degree followed by at least five years of "progressive experience" in the specialty. 8 C.F.R. 204.5(k)(2).

The petitioner submitted the Form I-140 petition with an approved labor certification for another alien, requesting that the beneficiary be substituted for the alien on the labor certification application. In support of its request, the petitioner submitted a March 7, 1996 Memorandum from the Office of Examinations, HQ 204.25-P. This memo provides the following general requirement for substitution:

The substituted alien must have met all of the minimum education, training, or experience requirements, as stated in Part A of the original Form ETA 750 filed by the employer, at the time the original labor certification application was submitted to the state employment office. The petitioner must submit documentation that the substituted alien meets the education, training, or experience requirements set forth in the original labor certification application.

On Line 14 of the ETA 750, the petitioner indicated that the position required six years of college education and a Master's degree. The Form ETA 750B indicates that the beneficiary attended East China University of Science and Technology from September 1991 to July 1995, obtaining two Bachelor of Science degrees from that institution. The beneficiary then attended Wright State University in Dayton, Ohio from April 1996 to August 1997, earning his Master's degree in computer science upon graduation. The director concluded that while the beneficiary had an advanced degree, he did not have six years of college education as required on the labor certification application.

On appeal, counsel argues that the director erred in considering calendar months instead of academic years and added an additional educational requirement to the advanced degree classification which will punish those who attend accelerated Master's programs.

Counsel's arguments mischaracterize the director's decision. First, counsel implies that the beneficiary only failed the six year education requirement because the director considered "calendar months." The petitioner, however, only attended Wright State University for one academic year and a summer semester. While we do not require 12 full calendar months of non-stop education, a single summer semester does not amount to a full academic year.

Second, contrary to counsel's assertion, the director did not add any requirements to the definition of "advanced degree." The director did not question whether the beneficiary qualifies as an advanced degree professional. We acknowledge that the regulations do not require a two-year Master's program for this classification, but neither did the director. As the petitioner requested a substitution of beneficiaries, however, the issue is whether the substituted beneficiary meets the job requirements that the petitioner chose to include on the labor certification application.

In evaluating the beneficiary's qualifications, the Service must look to the job offer portion of the labor certification to determine the required qualifications for the position; the Service 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 Madany v. Smith, 696 F.2d 1008 (D.C. Cir. 1983); K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006 (9th Cir. Cal. 1983); Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey, 661 F.2d 1 (1st Cir. 1981). Here, block 14 of the Form ETA-750 plainly states that six years is the minimum level of education required to adequately perform the certified job. As the beneficiary has not completed six years of education, he does not qualify for the certified position.

While counsel questions the strict interpretation by the director, to hold otherwise would be to allow employers to obtain labor certifications for aliens with the same or less academic experience than the United States applicants who may have applied for the job and been turned down as unqualified.

The petitioner submits the minutes of an ISD Teleconference where the Service advised that where the labor certification requires a Master's degree *or a bachelor's degree plus five years of experience*, the Service will not require that a beneficiary with the equivalent of an advanced degree also have six years of education. The labor certification in this case, however, requires a Master's degree and does not allow for work experience as an equivalent. The petitioner also submitted a Memorandum from Acting Associate Commissioner [REDACTED] regarding determinations of whether a labor certification requires an advanced degree professional. Counsel notes that the memorandum requires that the labor certification application be read "as a whole." In context, however, the memorandum provides that in order to review the application "as a whole," the adjudicator must consider footnoted notations. In other words, the memo instructs adjudicators not to ignore the requirements set forth on the labor certification application. Whereas, counsel argues that we should ignore the six year education requirement the petitioner chose to include. Regardless, the memorandum does not address the issue in contention.



The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.