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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536



File: [Redacted] Office: CALIFORNIA SERVICE CENTER

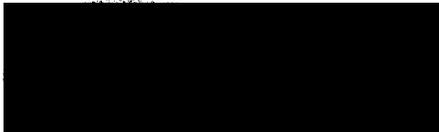
Date: DEC 09 2002

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)

PUBLIC COPY

IN BEHALF OF PETITIONER:



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 preference visa petition was denied by the Director, California Service Center, and the Associate Commissioner for Examinations dismissed a subsequent appeal. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be rejected as untimely, but the matter will be reopened on the Service's motion. The decision of the Associate Commissioner will be withdrawn, and the petition will be approved.

The petitioner is a software development company. It seeks to employ the beneficiary permanently in the United States as a UNIX systems programmer/software engineer 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 position does not require a member of the professions holding an advanced degree. The Administrative Appeals Office ("AAO"), acting on behalf of the Associate Commissioner, affirmed the director's decision and dismissed the appeal.

On motion, the petitioner submits evidence clarifying that the position requires, at minimum, five years of progressive post-baccalaureate experience.

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 beneficiary's eligibility as a member of the professions with an advanced degree is not in dispute. The issue to be determined here is whether this particular position requires a member of the professions holding an advanced degree or its equivalent. The key to this determination is found on Form ETA-750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. Blocks 14 and 15 of the ETA-750 Part A must establish that the position requires an employee with either a master's degree or 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)(4)(i).

The terms, "MA," "MS," "Master's Degree or Equivalent" and "Bachelor's degree with five years of progressive experience," all equate to the educational requirements of a member of the professions holding an advanced degree. The threshold for granting classification as an advanced degree professional will be satisfied when any of these terms appear in block 14.

Block 14 on the ETA-750 Part A contained in the record contains the following information:

Education – Bachelor's degree

Major Field of Study – Computer Science or Electrical Engineering

Experience – Five years in the job offered or in the related field of programmer/analyst

In denying the petition, the director stated that the labor certification form shows "a Bachelor's Degree as the minimum degree requirement. Therefore, since the position requires a minimum of a bachelor's degree, the position cannot be construed as an advanced degree position." The AAO acknowledged that the position also requires five years of experience, but the AAO concluded, without explanation, that "the petitioner has not established that the proffered position requires . . . a professional holding an advanced degree or its equivalent."

The above reasoning fails because the regulation at 8 C.F.R. 204.5(k)(4)(i) states, in part, that "[t]he job offer portion of the individual labor certification . . . must demonstrate that the job requires a professional holding an advanced degree or the equivalent." At 8 C.F.R. 204.5(k)(2), the regulations define "the equivalent" as a baccalaureate plus five years of progressive experience. Thus, a labor certification calling for a bachelor's degree plus five years of progressive experience is, by definition, calling for the equivalent of a master's degree.

Five years of experience in software development would necessarily be progressive, due to the highly technical nature and the rate of change in the computer field. This position, at a minimum, requires a professional holding the equivalent of a master'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 sustained that burden. Accordingly, the previous decision of the Associate Commissioner will be withdrawn, and the petition will be approved.

ORDER: The Associate Commissioner's decision of June 29, 1999 is withdrawn, and the petition is approved.