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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: Texas Service Center Date: 30 JAN 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 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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a designer and developer of computer software. It seeks to employ the beneficiary permanently in the United States as a programmer 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 position does not require a member of the professions holding an advanced degree.

On appeal, counsel asserts that the director should have re-adjudicated the petition under a different visa classification.

Section 203(b) of the Act states in pertinent part that:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The Service's regulation at 8 C.F.R. 204.5(k)(3) states:

(i) To show that the alien is a professional holding an advanced degree, the petition must be accompanied by:

(A) An official academic record showing that the alien has an United States advanced degree or a foreign equivalent degree; or

(B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

The Service's regulation at 8 C.F.R. 204.5(k)(4)(i) states, in pertinent part, "[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 or an alien of exceptional ability."

In this instance, Part A of the Form ETA-750 labor certification indicates that the position requires a bachelor's degree and two years of experience. The required experience falls three years short of the regulatory equivalent of a master's degree. There is no indication that the position requires exceptional ability.

The director denied the petition because the position does not require exceptional ability, a master's degree, or a bachelor's degree plus at least five years of progressive post-baccalaureate experience. On appeal, counsel does not contest the director's finding, but asserts that the director "should have issued a notice of Intent to Deny before making the final decision."

The regulations do not support counsel's claim. While 8 C.F.R. 103.2(b)(8) requires the director to request further evidence if "the Service finds that the evidence submitted . . . does not fully establish eligibility," this clause applies only in "instances where there is no evidence of ineligibility." The same regulation also states "[i]f there is evidence of ineligibility in the record, an application or petition shall be denied on that basis." The labor certification form, on its face, is evidence of ineligibility because the job requirements simply do not meet the standards necessary for the classification sought.

Counsel states that the petitioner checked the wrong box on the petition form, and thus requested the wrong classification. Counsel asks that the director "reconsider the position as though box 'd' had been checked," because the petition "should have been approved in the alternative for a 'skilled worker'" under section 203(b)(3) of the Act.

The cover letter accompanying the petition did not indicate what classification the petitioner sought for the beneficiary. The only direct indication of the classification sought was the box checked on the Form I-140 petition. The director's reliance on the information contained in this form does not constitute error. In the absence of evidence of Service error, a petitioner is not entitled to multiple adjudications, under multiple classifications, arising from a single visa petition and a single filing fee. If the director finds that a petition cannot be approved under the classification sought, the director is under no obligation to repeatedly adjudicate the petition under other classifications until the petition is approvable.

In any event, counsel's requested remedy (re-adjudication under section 203(b)(3) of the Act) is now moot. The petitioner has filed a new petition (receipt number SRC 01 011 50139), seeking that classification on the beneficiary's behalf. That petition has

been approved, with a priority date of June 12, 1998, which is the same priority date that would have attached to the petition at hand. Thus, neither the petitioner nor the beneficiary stand to gain anything from the re-adjudication of the petition now under discussion.

Because the labor certification requires neither an advanced degree nor exceptional ability, the petitioner has not satisfied 8 C.F.R. 204.5(k)(4)(i) and the petition cannot be approved. 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.

The dismissal of this appeal is without prejudice to any further proceedings arising from the approval of the petitioner's other visa petition filed on the beneficiary's behalf.

ORDER: The appeal is dismissed.