B5

U.S. Department of Justice

Immigration and Naturalization Service

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

[redacted]

File: EAC 99 260 51927 Office: Vermont Service Center Date: JUL 19 2002

IN RE: Petitioner:
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: Self-represented

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, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner (formerly named [redacted] provides information technology services. It seeks to employ the beneficiary permanently in the United States as a 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 beneficiary does not have the minimum experience required on the job offer portion of the labor certification.

On appeal, counsel states that the director misread the labor certification form, and asks that the Service consider the petition under a lesser classification if necessary.

Section 203(b)(2)(A) of the Act states in pertinent part that "[v]isas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . and whose services in the sciences, arts, professions, or business are sought by an employer in the United States." 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 holds a master's degree from Bharathidasan University in India. An independent evaluation in the record indicates that this degree is equivalent to a master's degree from a U.S. institution.

The critical issue arises from examination of 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. The ETA-750 Part A contained in the record lists, under "education," the requirement of a master's degree in computer science or engineering. Under "experience," the form indicates that the job requires five to ten years in the job offered or other "[s]oftware development experience."

On June 19, 2000, the director instructed the petitioner to "[s]ubmit evidence to establish that the beneficiary possessed the required Masters Degree and five years experience . . . as of November 16, 1998, the date of filing." In response, the petitioner stated that the director's notice contains "a typographical error" because the position requires "a Masters degree **OR** five years experience" (emphasis in original), rather than a master's degree *and* five years of experience.

The director denied the petition on October 24, 2000, stating:

> Your application for labor certification establishes the position requires a Master's Degree and five to ten years experience in Software development. You were requested . . . to submit evidence of the five years experience but your response was a statement indicating the labor certification indicated a Master's Degree or five years experience was required. A review of the document indicates no reference to

the five years being optional. You have submitted work affidavits indicating the beneficiary had three years and nine months experience as of the time of filing and does not appear to qualify.

On appeal, the petitioner maintains that the labor certification form requires a master's degree *or*, not *and*, five years of experience. Review of the Form ETA-750A in the record confirms the petitioner's assertion. The word "OR" has been typed into the block marked "Experience." Therefore, the petitioner is correct in that the director misinterpreted the information on the form.

This finding, however, also forces the conclusion that the position does not require a member of the professions holding an advanced degree. 8 C.F.R. 204.5(k)(4)(i) states, in pertinent part, "[t]he job offer part of the individual labor certification . . . must demonstrate that the job requires a professional holding an advanced degree or the equivalent." The master's degree requirement would meet this requirement. The Form ETA-750A, however, indicates that the master's degree is, in fact, optional rather than a requirement. The labor certification shows that the position requires a master's degree or five years of experience. The petitioner contends that, therefore, the beneficiary (by virtue of his master's degree) does not need five years of experience. By the same token, however, another applicant with five years of experience need not hold a master's degree. Thus, the position does not require a master's degree. Furthermore, the form does not require that the five years of experience be post-baccalaureate experience. There is no alternative educational requirement for applicants who do not hold a master's degree. The wording on the Form ETA-750A indicates that an applicant who can demonstrate five to ten years of experience need not demonstrate any educational credentials at all.

Because the petitioner has stated (and repeatedly emphasized) that the position requires a master's degree or five years of experience, rather than a master's degree or a bachelor's degree plus five years of experience, we cannot find that the job as described requires a member of the professions holding an advanced degree, and therefore the petition must be statutorily denied.

The petitioner, on appeal, asks that "the petition be reinstated and processed under the EB-3 preference category" (i.e., under section 203(b)(3) of the Act, and regulations at 8 C.F.R. 204.5(l) of the Act) if it cannot be approved under the classification originally sought. There is, however, no provision in statute, regulation, or case law which permits a petitioner to change the classification of a petition once a decision has been rendered. If the petitioner seeks a second adjudication, based on a second immigrant classification, then such adjudication must arise from a second visa petition with fee. The Service will not repeatedly adjudicate the same petition until a classification is found under which the petition can be approved.

The terms of employment described by the petitioner do not meet the threshold of a position that requires a member of the professionals holding an advanced degree or its equivalent. This denial is without prejudice to the filing of a new petition, seeking a more appropriate classification, accompanied by a labor certification, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.