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U.S. Department of Justice

Immigration and Naturalization Service

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[redacted]

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

2 5 JUL 2002

File: EAC 00 005 51348 Office: Vermont Service Center Date:

IN RE: Petitioner: [redacted]
Beneficiary:

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 sustained and the petition will be approved.

The petitioner is a software consulting firm. It seeks to employ the beneficiary permanently in the United States as a senior 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 job offered did not require a member of the professions holding an advanced degree or the equivalent, and that the petitioner does not have the post-baccalaureate experience to qualify for the classification.

On appeal, the petitioner states the proffered position requires an advanced degree professional and that the beneficiary qualifies for that classification.

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 first issue is whether the beneficiary, who does not hold a master's degree, has progressive post-baccalaureate experience equivalent to a master's degree. According to an evaluation report contained in the record, in 1984 the beneficiary earned a foreign degree that is equivalent to a United States baccalaureate in mechanical engineering. The record also reflects the beneficiary's experience in the software field from February 1988 onward, indicating over ten years of experience as of the December 1998 filing of the application for labor certification.

The director asserted that the beneficiary's experience is not qualifying because the employment verification letters do not refer to his experience as "progressive." While the word does not appear in the letters, five years of experience in the software industry would necessarily be progressive, due to the highly technical nature and the rate of change in the computer field. Also, the record shows that the beneficiary received a promotion to deputy manager in April 1993, showing that he has in fact held progressively responsible positions. Therefore, the beneficiary qualifies as a member of the professions holding the equivalent of an advanced degree.

The second 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.

It is also important that the ETA-750 be read as a whole. In particular, if the education requirement in block 14 includes an asterisk (*) or other footnote, the information included in the note must be included in determining whether the educational requirement, as a whole, shows that an advanced degree or the equivalent is the minimum acceptable qualification for the position.

The ETA-750 Part A contained in the record reflects the following:

Item 14: Education – "Master's**"
Major Field of Study – "computer science, engineering, mathematics, chemistry, or physics."

Experience – [no general experience requirement listed]

Item 15: "**will accept bachelor's degree plus at least 5 years experience as a computer professional in lieu of the master's degree. (Progressive experience in the specialty.)

The director, noting the different font used for the passage relating to progressive experience, determined that the labor certification form had been altered and denied the petition. On appeal, the petitioner asserts that the phrase was added to the already-prepared labor certification form prior to its submission to the Department of Labor, and that the initial omission of the phrase constitutes "harmless error."

As we noted above, the beneficiary's highly technical field can be considered inherently progressive, due to the highly technical nature and the rate of change in the computer field, and the beneficiary's 1993 promotion plainly establishes progressive responsibility. The determination to approve the petition would have been made simpler if the petitioner's reference to progressive experience had been included when the labor certification form was first prepared, but we concur with the petitioner that this omission constitutes "harmless error" under the circumstances, where the nature of the work to be performed is inherently progressive. There is nothing in the record to suggest that the labor certification form was altered after the fact with the intention of defrauding the Service, and the total omission of the word "progressive" would not have been fatal to the petition. This position requires a professional with an advanced degree or its equivalent, and the beneficiary's progressive post-baccalaureate experience is equivalent to such a degree.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has met that burden.

ORDER: The decision of the director dated November 1, 2000 is withdrawn. The appeal is sustained and the petition is approved.