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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

[Redacted]

File: [Redacted]

Office: Texas Service Center

Date: MAY 13 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:

[Redacted]

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 J. 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 initially sought to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks to employ the beneficiary as an applications programmer. As required by statute, the petition was accompanied by an individual labor certification from the Department of Labor. In response to the director's notice advising the petitioner that the job described in the labor certification did not require an advanced degree or the equivalent, the petitioner requested that the beneficiary be classified as an alien of exceptional ability. The director found that even if the petitioner were permitted to "amend" the Form I-140 petition as requested, the beneficiary did not qualify as an alien of exceptional ability.

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.

(B) Waiver of Job Offer. -- The Attorney General may, when he deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

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 beneficiary holds a Master's degree in a field relevant to the position sought. 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.

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.

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

Education – "Bachelor Degree"
Major Field of Study – "Electrical and Computer Engineering or Computer Science"
Experience – "2 Years"

In denying the petition, the director found that the ETA-750 did not require an advanced degree or the equivalent (bachelor's degree followed by five years of progressive experience). Counsel does not contest this determination on appeal and we concur with the director.

In response to the director's May 13, 1999 notice, the petitioner sought to classify the beneficiary as an alien of exceptional ability. The director, somewhat incongruously, asserts that while the petitioner could have requested to amend the petition to seek an entirely different classification under section 203(b)(3) of the Act, Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971) precludes the petitioner from "amending" the petition to seek a different sub-classification under section 203(b)(2) of the Act. Nevertheless, the director did consider the petitioner's claim and concluded that the petitioner had not established that the beneficiary was an alien of exceptional ability. We will review that determination below.

The regulation at 8 C.F.R. 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. These criteria follow below.

The regulation at 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below; qualifications possessed by every member of a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered." The petitioner claims that the beneficiary meets the following criteria.

An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability

The petitioner claims to have a Master's Degree in Computer Application in Industry from China University of Mining and Technology and has a second Master's Degree in Engineering from Tennessee State University. Two Master's degrees relevant to his current work are well beyond what is required for this field. As such, the degrees can serve to meet this criterion.

Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought

Fan Xun, the director of the personnel division at New Technology and Computer Application Inc., part of the China University of Mining and Technology, confirms that the beneficiary worked at that company from July 1985 to August 1994. Wei-Meng Phillips, a fellow software engineer at CSI confirms that the beneficiary worked there from March 1997 to August 1997. The petitioner confirms that the beneficiary has been working for the petitioning company since September 1997. The filing date for the petition is January 28, 1999. It appears that the beneficiary had 10 years of experience prior to that date and, thus, meets this criterion.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

In response to the director's initial notice, the petitioner submitted a letter from Fan Xun, director of the personnel division at the China University of Mining and Technology asserting that in 1991, the Ministry of Energy Resources of the People's Republic of China presented the beneficiary with an award "for his great contribution to applying computer technology to [the] coal industry." Mr. Xun further asserted that the beneficiary also received awards from the school in 1990 and 1993. The petitioner, however, did not submit the award itself. On appeal, the petitioner submits the 1991 award from the Ministry. As such, the petitioner has now demonstrated that the beneficiary meets this criterion.

While the petitioner has now established that the beneficiary is an alien of exceptional ability, reversal of the director's decision is still not warranted. On appeal, counsel asserts that neither the regulations nor the law requires that the job specified on the labor certification call for an alien of exception ability. This assertion is simply wrong. 8 C.F.R. 204.(k)(4)(i) provides, in pertinent part:

The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent *or an alien of exceptional ability*.

(Emphasis added.) The requirements on the labor certification, a bachelor's degree plus two years of experience, fall far short of the extra degree and ten years of experience on which the petitioner relies for the beneficiary's eligibility as an alien of exceptional ability.

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.