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U.S. Department of Justice  
Immigration and Naturalization Service

Administrative Code Section 10  
-Final Agency Decision  
-Final Agency Decision

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



File: [Redacted] Office: Texas Service Center

Date: 28 MAY 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:



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

The petitioner is a software consulting firm. It seeks to employ the beneficiary permanently in the United States as a database 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 beneficiary does not have the minimum experience listed as a job requirement on the labor certification. The director also found that the beneficiary's work experience was not progressive in nature, as is required when the beneficiary does not hold an advanced degree.

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)(i) states:

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.

In this instance, the petitioner does not claim that the beneficiary holds an advanced degree. Instead, the petitioner contends that the beneficiary's post-baccalaureate experience is equivalent to a master's degree. The petitioner must show that the beneficiary had the education and experience required on the labor certification as of the petition's filing date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is September 10, 1999.

Block 14 of the Form ETA-750A labor certification indicates that the position in which the petitioner seeks to employ the beneficiary requires an M.S. in Computer Science or a related field, plus one year of relevant work experience, or, in the alternative, a "B.S. (or equivalent) in Computer Science or related field with five years experience . . . may be substituted for M.S." Because the beneficiary does not hold an M.S. degree, the petitioner must show that the beneficiary has at least six years of qualifying experience; five years to represent the equivalent of the master's degree, and one additional year of experience because the position requires an M.S. plus one year of relevant experience.

The Form ETA-750B Statement of Qualifications of Alien lists the following information pertaining to the beneficiary's qualifications:

Education:

University of Madras	7/89 – 4/92	B.S., Mathematics
Computer Point Academy	2/93 – 5/94	Post Graduate Diploma

Employment:

T.D. Raj Associates	4/92 – 6/93
Gigabytes	7/93 – 5/95
French Connection	6/95 – 7/96
Software Technical Services, Inc.	8/96 – 3/97
Aeronomics Incorporated	4/97 – 1/98
The petitioner	2/98 – 9/99

The time that the beneficiary has worked for the petitioner cannot count toward the experience requirement. The Department of Labor regulation at 20 C.F.R. 656.21(b)(5) requires the employer to demonstrate "that its requirements . . . represent the employer's actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity." If the beneficiary's work for the petitioner counted toward the minimum, it would plainly establish that the petitioner has hired a worker (the beneficiary) with less experience than the minimum that it now claims.

Counting the months of employment listed on the beneficiary's Form ETA-750B, the director found that the beneficiary has less than the required six years of experience. Therefore, the director instructed the petitioner to submit further evidence to establish the beneficiary's eligibility for the job offered. In response, the petitioner has submitted copies of previously submitted employment letters, and a new letter from Dew Drop Investment, Ltd., indicating that the beneficiary "has been a part-time employee of our company . . . from August 1991 until February 1992 as Computer Operator." Counsel asserts that the beneficiary's six months of part-time experience is equal to three months of full-time experience, and that the beneficiary's remaining experience equals 69 months, for an aggregate total of 72 months, or six years.

The director denied the petition, stating that the beneficiary's work at Dew Drop Investments cannot be considered because it was part-time employment, and it took place before the

beneficiary had completed his B.S. degree. The director found that the beneficiary's "remaining experience equals 65½ months, or 5 years and 5½ months, of post baccalaureate experience."

On appeal, counsel argues that the director has misconstrued the progressive nature of the beneficiary's employment. We concur that the beneficiary's occupational duties are inherently progressive in nature.

Counsel repeats the argument that the beneficiary has 69 months of full-time experience, and six months of part-time experience equivalent to three months of full-time experience. This claim fails for various reasons. First, counsel cites no statute or regulation to show that part-time experience can be considered in the aggregate as a smaller amount of full-time experience. Also, the petitioner has not shown that the beneficiary's part-time experience involved at least half of the hours of a full-time job, so there is no justification for counsel's assertion that the beneficiary's six months of part-time work equal three months of full-time employment.

Counsel also argues that, while the five years of experience equating to a master's degree must be post-baccalaureate, there is no similar requirement for the remaining one year of experience required by the labor certification. This argument is in direct conflict with 8 C.F.R. 204.5(k)(2), which defines "profession" as "one of the occupations listed in section 101(a)(32) of the Act, as well as an occupation for which a United States Baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The Department of Labor has defined the occupation as "database administrator," which is not listed in section 101(a)(32) of the Act. By regulation, any work performed before the beneficiary received a bachelor's degree cannot meet the regulatory standard of professional employment, and thus cannot qualify as prior experience in a professional occupation. We will discuss the beneficiary's education in greater depth further below.

Counsel asserts that the beneficiary "was never unemployed" during the 69-month period from April 1992 to January 1998 (immediately before the petitioner hired the beneficiary). The employment verification letters in the record, however, show gaps of several weeks. The beneficiary stopped working for Gigabytes in May 1995, and did not begin working at French Connection until June 13, 1995. The beneficiary states that he left French Connection in July 1996, and the letter from his next employer, Software Technical Services, indicates that he began working there on August 16, 1996. Before the beneficiary began working for the petitioner in February 1998, he left Aeronomics Incorporated on January 25, 1998. These three letters establish a cumulative gap of over a month in the beneficiary's employment, even if we assume without proof that every other job started on the first day of a given month and ended on the last day of the month.

For the foregoing reasons, we cannot conclude that the beneficiary had, as of the petition's filing date, accumulated the six years of post-baccalaureate experience required for the position.

Beyond the director's conclusions, additional information in the record supports the denial of this petition. The record contains an independent evaluation of the beneficiary's educational credentials. The evaluator did not find that the beneficiary's B.S. from the University of Madras

is equivalent to a baccalaureate from an accredited U.S. institution. Rather, the evaluator found that the beneficiary attended “a three-year (six semester) program of study in Mathematics transferable to a regionally accredited university in the United States.” In other words, the credits that the beneficiary earned are transferable to a U.S. university. The evaluator did not find that the beneficiary’s three-year degree is, itself, equivalent to a U.S. four-year bachelor’s degree in Mathematics.

The evaluator found that the beneficiary’s studies at Computer Point Academy amounted to “a one-year (two semester) program of study in Computer Science and is equivalent to a second major in Computer Science from the United States.” The evaluator, looking at all of the beneficiary’s educational experience in the aggregate, found that the beneficiary “has the equivalent to the degree, Bachelor of Science in Mathematics with a second major in Computer Science, from a regionally accredited university in the United States.”

The labor certification calls for a “B.S. (or equivalent).” The assertion that the beneficiary’s three-year degree, and his one year of later studies, form the aggregate equivalent of a U.S. baccalaureate is not persuasive. While the regulations allow the beneficiary to compensate for the absence of an actual advanced degree, there is no comparable provision to excuse the lack of an underlying degree that is equivalent to a U.S. baccalaureate. 8 C.F.R. 204.5(k)(3)(i)(B) plainly requires “[a]n official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree.” The beneficiary’s accumulation of credits at different institutions has not resulted in a single degree that is equivalent to a United States baccalaureate.

In the petitioner’s response to the director’s request for additional evidence, counsel had stated “the petitioner requests the opportunity to amend its petition to accord the alien EB-3 (third preference) classification.” The director, in denying the petition, rejected this request, which amounted in effect to a request for two adjudications stemming from a single petition. The director’s refusal, of course, did not preclude the petitioner’s filing of another petition seeking the other classification on the beneficiary’s behalf. Service records indicate that the petitioner did in fact file such a petition, receipt number SRC 00 280 53391, shortly after filing the appeal in the present matter.

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.