

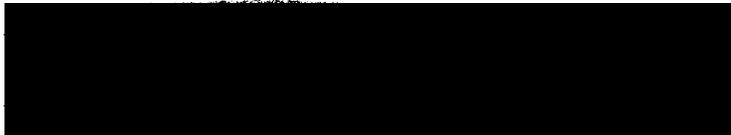


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U.S. Department of Justice
Immigration and Naturalization Service

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



File: EAC 00 068 52787 Office: Vermont Service Center

Date: **NOV 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:



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 preference 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 is a web applications development company. 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 did not possess the minimum level of experience specified in the labor certification.

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 CFR 204.5(k)(2).

The director did not dispute that beneficiary possesses the foreign equivalent to a United States bachelor's degree in computer engineering. The petitioner has also submitted evidence to demonstrate that the beneficiary has five years of progressive experience as a software engineer. Consequently, the beneficiary qualifies as an advanced degree professional. The issue to be determined here is whether the beneficiary possesses the minimum level of experience as specified in the labor certification. 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. The petitioner must demonstrate that the beneficiary meets the minimum requirements specified in Blocks 14 and 15 of the ETA-750 Part A.

It is 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 beneficiary meets the minimum acceptable qualifications for the position.

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

- Block 14: Education – Master's or equivalent* in Computer Science or Computer Technology or Related Field
Experience – 3 years in the job offered or 3 years in a related occupation
- Block 15: *A Bachelor's Degree or Equivalent in Computer Science or Computer Technology or Related Field and 5 years of progressive work experience is considered to be the equivalent of a Master's Degree by our company.

In this matter, it is apparent that the petitioner specifically requires a Master's degree in computer science or a related field, plus three years of experience in the job offered or a related occupation. Block 14 includes an asterisk, which refers to block 15. At block 15, it is apparent that, in lieu of a Master's degree, the employer would also accept a bachelor's degree in computer science or a related field, plus five years of progressive experience in the computer field.¹ Based on the above requirements, an individual with a Master's degree must demonstrate three years of experience and an individual with only a Bachelor's degree must demonstrate eight years of experience.

The petitioner provided letters from the beneficiary's former employers detailing his work experience as software engineer from August 1993 to October 1998. The petitioner also provided a supplemental statement attempting to amend the requirements specified in the labor certification. In a letter dated November 30, 1999, Shirley Batista, Human Resources Manager, Logical Design Solutions, Inc., stated: "Please note, a Bachelor's degree in computer science or engineering or a directly related field and 5 years of progressive work experience is considered the equivalent of a Master's degree and 3 years of work experience as a computer professional." Block 15 of the ETA-750 above, however, mentions only the master's equivalency and does not include the "3 years of work experience as a computer professional." The petitioner cannot amend the terms an approved labor certification. Such action would fall under the discretion of the Department of Labor.

In the decision denying the petition, the director stated:

Block 15 only allows for the substitution of education. No reference is made regarding the required three years of experience. Therefore, the beneficiary is required to demonstrate the attainment of at least a bachelor's degree in Computer Science or Computer Technology and at least eight years of experience.

On appeal, counsel cites a Service Memorandum by the Acting Associate Commissioner, Office of Programs, and Deputy Executive Associate Commissioner, Office of Field Operations, dated March 20, 2000. The memorandum provides specific guidance regarding the education and experience requirements for employment-based second preference immigrants. The memorandum notes that a petition seeking classification for an advanced degree professional "should be decided on a case-by-case basis."

Page 6 of the memorandum states:

Relevance of the alien beneficiary's actual qualifications

¹ In this case, however, the beneficiary is not relieved of demonstrating the three years of experience specified under Block 14. Block 15 specifically states that the bachelor's degree plus five years of progressive experience "is considered to be the equivalent of a Master's degree," not the equivalent of a Master's degree plus three years of work experience.

The second and third examples raise an additional question to be decided before approving some petitions – those in which the alien beneficiary does not actually have a Master's degree. The ETA-750 in each of those cases requires that a candidate with a Master's degree must have three years' experience, but that a baccalaureate with five years' experience is acceptable. The question is whether the petitioner can include the alien's 5 years' post-baccalaureate progressive experience *both* to make the alien's baccalaureate the equivalent of a Master's degree *and* to meet the three years' experience that someone who actually does have a Master's degree must have. The answer will depend on what the ETA-750 actually says. Note that the sample ETA-750s do not require that the three years' experience must follow the receipt of a Master's degree-- only that the applicant must have both the degree and the experience. The ETA-750, therefore, does not preclude someone who just received a Master's degree from qualifying for the position on the basis of pre-Master's experience. By the same reasoning, someone with a baccalaureate degree, and experience that makes it equivalent to a Master's can qualify based on the pre-Master's equivalency experience. If the beneficiary has a baccalaureate with five years' progressive post baccalaureate experience, the petition should be approved unless the ETA-750 clearly and explicitly requires that the level of experience that a Master's applicant must have must be post-magisterial experience.

If the ETA-750 *does* require that the experience must have been post-magisterial experience, and the alien beneficiary just has the baccalaureate plus five years' progressive post-baccalaureate, then the alien beneficiary cannot meet the post-magisterial experience requirement. In that case, the petition should be denied, not because the alien beneficiary is not an advance degree professional, but because the alien does not meet the actual qualifications as stated on the ETA-750.

The issue in this case is not whether the beneficiary's experience can be counted twice -- once toward the Master's degree equivalency requirement and once toward the three years of additional experience requirement. Instead, the issue here pertains to the amount of experience actually required by this particular ETA-750 for an alien with a Baccalaureate degree and experience equivalent to a Master's. Counsel argues that the ETA-750 makes no statement in regard to post-magisterial requirements and therefore the beneficiary is permitted to use his five years of experience twice. The director, however, has not required any post-magisterial experience or disputed any of the beneficiary's pre-Master's equivalency experience. In fact, the director acknowledged the petitioner as having "six years of progressive work experience," thus crediting the petitioner for all of his work experience. If the beneficiary in this case had eight years of qualifying experience prior to the petition's filing, regardless of whether it was pre-Master's equivalency experience, it would have rendered him eligible. The director's finding was based on what the ETA-750 stated to be the equivalent of a master's degree education. Beyond the master's degree education or its equivalent (a bachelor's degree and five years of progressive experience), the ETA-750 clearly required three additional years of experience. As noted in the above memorandum, the beneficiary's eligibility depends on what

the ETA-750 actually says and therefore the specific wording of Blocks 14 and 15.

We agree that experience may be counted twice under the circumstances described in the March 20, 2000 memorandum. If, for example, Block 15 of the ETA-750 in this case had stated that the beneficiary's bachelor's degree plus five years of progressive experience was considered to be the equivalent of a Master's degree *plus three years of experience in the job offered or a related occupation*, this case would have been similar to Position 3 on Page 5 of the memorandum, thus rendering the beneficiary eligible.

In this case, however, the wording of the labor certification requires a minimum of eight years of experience for individuals with a Baccalaureate degree (and experience that makes it equivalent to a Master's). Therefore, we concur with the director that the beneficiary does not possess the minimum level of experience specified in the labor certification.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.