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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 99 254 51360 Office: VERMONT SERVICE CENTER Date: OCT 08 2002

IN RE: Petitioner:
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)

PUBLIC COPY

IN BEHALF OF PETITIONER: SELF-REPRESENTED

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 The decision of the director will be withdrawn, the appeal will be sustained, and the petition will be approved.

The petitioner is an information technology services firm. 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 position offered does not require a member of the professions holding an advanced degree or its equivalent, and that the beneficiary does not possess the equivalent of an advanced degree.

On appeal, the petitioner maintains that the position sought by the beneficiary meets the requirements of the pertinent visa classification and asks that, if the petition cannot be approved under the classification sought, the director consider the petition under another classification.

The petitioner has requested that this petition be considered pursuant to section 203(b)(3) of the Immigration and Nationality Act. 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. Consequently, discussion in this matter may relate only to the beneficiary's eligibility pursuant to section 203(b)(2) of the Act. This issue, at any rate, is rendered effectively moot by the approval of the petition.

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 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.

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

Education – Bachelor’s degree or equivalent

Major Field of Study – Engineering, Mathematics, or Computer Science related

Experience – Five years in the job offered or related occupation

On the ETA-750B Statement of Qualifications section of the application for labor certification, the beneficiary claims the following full-time experience as a software engineer:

VXL Instruments, Ltd.	4/1988 – 6/1995
Fidelio India Pvt., Ltd.	7/1995 – 6/1997
Petitioning entity	7/1997 – onward

The petitioner has submitted a letter from A.V. Kasargod, managing director of VXL Instruments, Ltd., affirming that the beneficiary “worked with us as an ‘Asst. Manager’ in our Research & Development (Software) Department, from 12th May 1988, till 04th July 1995.” This letter verifies over five years of experience in the occupation.

The director denied the petition, stating that the petitioner has not established that the beneficiary’s work experience has been progressive in nature, or that the job requires progressive experience. The director asserted that five years of non-progressive post-baccalaureate experience is not equivalent to an advanced degree.

We find, however, that five years of experience in software engineering would necessarily be progressive, due to the highly technical nature and the rate of change in the computer field. The petitioner has provided an independent evaluation that agrees with this general conclusion. The determination to approve the petition would have been made simpler if the petitioner had required “progressive” experience on the labor certification, but the petitioner’s failure to use that word may be excused in this case, where the nature of the work to be performed is inherently progressive. This position, at a minimum, requires a professional holding an advanced degree or its equivalent.

The petitioner has satisfactorily shown that this position, at a minimum, requires a professional holding the equivalent of an advanced degree, and that the beneficiary qualifies as a member of the professions holding the equivalent of an advanced 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 December 22, 2000 is withdrawn. The appeal is sustained and the petition is approved.