

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

B5

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

ADMINISTRATIVE APPEALS OFFICE  
425 Eye Street N.W.  
BCIS, AAO, 20 Mass, 3/F  
Washington, D.C. 20536



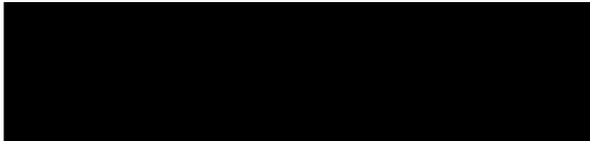
File: [REDACTED] LIN 02 071 55639 Office: Nebraska Service Center

Date: AUG 18 2003

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)

ON 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 Bureau of Citizenship and Immigration Services (Bureau) 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.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks 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 with an advanced degree. The petitioner, a software consulting firm, seeks to employ the beneficiary permanently in the United States as a senior systems analyst. As required by statute, the petition was accompanied by certification from the Department of Labor.

The director determined that the beneficiary does not qualify for the job offered because the evidence does not establish that the beneficiary has the foreign equivalent of an advanced degree.

On appeal, the petitioner's counsel contends that the evidence is sufficient to establish that the beneficiary's education and experience qualify him as a member of the professions holding an advanced degree or its equivalent.

Section 203(b)(2)(A) of the Act states in pertinent part:

Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees . . . whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

8 C.F.R. § 204.5(k)(2) defines an advanced degree:

*Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is December 18, 2000. Block 14 of the Application for Alien Employment Certification Form ETA-750A, indicates that the applicant for the position of senior systems analyst must have a master's degree or equivalent in computer science, engineering or a related field of study. Block 15 provides that a bachelor's degree or equivalent in computer science, engineering or a directly related field and 5 years progressive experience is considered the equivalent of a master's degree.

The beneficiary obtained a "bachelor of engineering (computer)" degree from Amravati University in June 1990. The issue in this case is whether the evidence submitted was sufficient to document that the beneficiary has the equivalent of an advanced degree by showing that he accrued five years of post-baccalaureate progressive experience as of the filing date of the petition, December 18, 2000.

The regulation at 8 C.F.R. § 204.5 (g) provides in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The regulation at 8 C.F.R. § 103.2 also provides guidance in evidentiary matters. It states in pertinent part:

*(b) Evidence and processing—*

(1) *General.* An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instructions on the form. Any evidence submitted is considered part of the relating application or petition.

(2) *Submitting secondary evidence and affidavits—*

(i) *General.* The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

In denying the petition, the director specifically identified the insufficiency of the evidence regarding two of the beneficiary's past employers, Modi Alkalies Chemical Ltd. (MACL) and Tata Consultancy Services. The director noted that the evidence consisting of copies of letters of offers of employment from the respective companies and resignation letters from the beneficiary did not sufficiently document continuous employment. We agree. We note also the employers' failure to specifically describe the duties the beneficiary performed at MACL and Tata Consultancy Services. We further note that the employer letters confirming the beneficiary's employment at Anderson Consulting and

CBSI failed to specify the duties performed by the beneficiary as required by 8 C.F.R. § 204.5(g). The petitioner has failed to establish five years of progressively responsible experience as required.

We note that with the initial filing of the petition, the petitioner included a chart showing the beneficiary's previous work experience with past employers, and affidavits from co-workers with four different employers attesting to the beneficiary's work experience at those respective companies. One of these affidavits comes from a MACL co-worker and one is submitted by a co-worker from Tata Consultancy Services.

On March 29, 2002, the director requested evidence in the form of letter(s) from current or former employer(s) pursuant to 8 C.F.R. § 204.5(g). With the response, the petitioner included a copy of an undated letter from MACL offering employment to the beneficiary as a senior programmer analyst, a copy of a June 24, 1991 letter of appointment setting forth the terms and conditions of the beneficiary's employment and noting that the beneficiary entered on duty on June 21, 1991, and a letter of resignation from the beneficiary dated February 24, 1992. The petitioner also submitted a copy of a February 15, 1992 letter from Tata Consultancy Services offering employment to the beneficiary as an assistant systems analyst, a copy of a March 10, 1992 letter setting forth the terms and conditions of the beneficiary's employment, a copy of an August 8, 1996 letter of resignation from the beneficiary, and a copy of a January 1995 pay stub from Tata Consultancy Services. The petitioner also submitted its own letter attesting to the beneficiary's past employment history and an additional work history chart describing the beneficiary's employment with various former employers.

On appeal, counsel contends that the director failed to consider the petitioner's confirmation of the beneficiary's past work experience. The petitioner is the beneficiary's current employer. In view of the requirements noted above at 8 C.F.R. 103.2(b)(2)(i) relating to secondary evidence and affidavits, the petitioner's attestations as to the beneficiary's experience at previous jobs with different employers carries little evidentiary weight. Counsel argues that the petitioner, as the beneficiary's current employer, may establish the beneficiary's progressively responsible work experience gained with a different employer. The regulation at 8 C.F.R. § 204.5(g) does not allow a current employer to prove experience an alien gained while working for a different employer. That evidence should come from the companies that actually employed the beneficiary during the particular period in question.

If primary evidence such as an employer letter is not available, then the petitioner should demonstrate its unavailability and submit relevant secondary evidence. If secondary evidence, such as tax returns or pay stubs verifying the alien's employment, is unavailable, the petitioner must demonstrate the unavailability of such evidence and then may submit affidavits pursuant to the requirements of 8 C.F.R. § 103.2(b)(2). We note that two or more affidavits from individuals who are not parties to the petition and who have direct personal knowledge of an event are only acceptable after the petitioner demonstrates the unavailability of the required primary and relevant secondary evidence. With reference to the beneficiary's employment at MACL and Tata Consultancy, respectively, one affidavit was submitted from a co-worker at each company. We note that counsel mentions the unavailability of evidence relating to the beneficiary's work experience with past employers for the first time on appeal. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).



The director did not err in denying the petition based on the failure of the petitioner to sufficiently document the beneficiary's past employment experience. Without such evidence, the petitioner has not established that the beneficiary has five years of progressive experience and qualifies as a member of the professions with an advanced degree as defined in the regulations.

The burden of proof in these proceedings rests solely 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.