

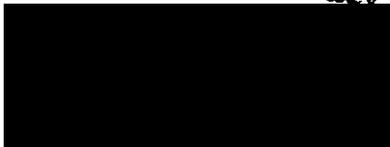


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U.S. Department of Justice  
Immigration and Naturalization Service

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



File: EAC 01 091 52430 Office: VERMONT SERVICE CENTER

Date: FEB 06 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)

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, Vermont Service Center, and is now before the Associate Commissioner for Examinations 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 holding an advanced degree. The petitioner, a software development and consulting company, seeks to employ the beneficiary as a software engineer. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that beneficiary does not possess an advanced degree or its equivalent, and thus cannot qualify for the classification sought.

Section 203(b)(2)(A) of the Act states in pertinent part that “[v]isas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.” 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 critical issue arises from examination of 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 ETA-750 Part A contained in the record lists, under “education,” the requirement of a master’s degree in business administration, information technology, engineering or a related field.

An independent evaluation submitted with the petition indicates that the beneficiary “has the equivalent of three years of university-level credit in business administration from an accredited college or university in the United States.” The evaluation also indicates that, factoring in the petitioner’s employment experience, the beneficiary has “the equivalent of . . . a bachelor’s degree in management information systems from an accredited college or university 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.

The above regulation allows for post-baccalaureate experience to serve in place of a master's degree, but it does not allow for employment experience in lieu of the underlying baccalaureate degree.

On August 15, 2001, the director sent the petitioner a notice stating, in pertinent part:

It does not appear that your petition is approvable to classify the beneficiary as a second preference alien under section 203(b)(2) of INA because a master's degree is necessary and [the beneficiary] only has the equivalent of a B.A. degree. If you wish to change the requested preference classification, please . . . indicate the new preference number and classification that you are seeking.

In response to this notice, an official of the petitioning company reaffirmed the petitioner's intention to classify the beneficiary under section 203(b)(2) of the Act, as originally requested.

The director denied the petition, stating that the beneficiary does not meet the educational requirements of the labor certification or of the requested immigrant classification. On appeal, the petitioner does not contest the director's finding. The petitioner requests that the director consider the petition under section 203(b)(3)(A)(i) of the Act, to classify the beneficiary as a skilled worker. 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. Given the opportunity to change the classification when such a change was still permissible, the petitioner declined that opportunity.

Even if the petitioner had taken the earlier opportunity to change the classification sought, the petitioner would still bear the burden of establishing that the beneficiary meets the requirements shown on the ETA-750 Part A labor certification form.

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.