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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

[redacted]

File: EAC 01 030 51820 Office: VERMONT SERVICE CENTER Date: JAN 17 2003

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:

[redacted]

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 CFR 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 CFR 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Elizabeth Hayward

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant 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 software development, networking and consulting firm. It seeks to employ the beneficiary as a senior systems 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 does not qualify for the position offered.

On appeal, the petitioner requests reconsideration of the petition under a different immigrant classification.

The Service's regulation at 8 CFR 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.

While the above regulations allow for a combination of experience and education to serve in the place of an actual master's degree, there is no comparable allowance for a combination of experience and education to serve in the place of an actual bachelor's degree. The requirement of "a foreign equivalent degree" indicates that the alien must possess a single degree (rather than a series of degrees) that is, standing alone, equivalent to a U.S. baccalaureate. The cited regulation is binding upon the Service in matters relating to immigrant classification under section 203(b)(2) of the Act, and the director has no discretion to disregard the regulatory standard in favor of some other standard that may be more conducive to the approval of the petition.

In block 14 of the Form ETA-750A application for labor certification, the petitioner indicated that the position requires a master's degree, but that the petitioner would accept a "Bachelor's degree with 5 years experience" in lieu of a master's degree. This substitution is consistent with the regulatory definition of the equivalent of a master's degree, set forth at 8 CFR 204.5(k)(2) and repeated in the above-cited regulation at 8 CFR 204.5(k)(3)(i)(B).

Neither the petitioner nor the beneficiary claim that the beneficiary holds a master's degree or a baccalaureate from a U.S. college or university. Therefore, to qualify for the classification sought, and for the position described on the labor certification, the petitioner must show that the beneficiary holds a degree equivalent to a U.S. baccalaureate, and has at least five years of post-baccalaureate experience. On the Form ETA-750B statement of qualifications, the beneficiary indicated that he earned a Bachelor of Science degree at Bhavan's College, Bombay, between June 1981 and October 1985. Letters from previous employers document the beneficiary's experience from April 1993 to March 1999, and the beneficiary began working for the petitioner in April 1999. Thus, as of the August 2000 filing of the application for labor certification, the beneficiary had over seven years of post-university experience in his occupation. At the time the petitioner hired the beneficiary, the beneficiary had just under six years of such experience.

With regard to the beneficiary's education, a certificate from the University of Bombay indicates that the beneficiary "passed the **B.Sc. Degree (Three Year Integrated Course)** Examination held by the **University of Bombay** in the month of October 1985." Other University of Bombay documents likewise refer to the "three year integrated degree course," and one certificate indicates that the beneficiary's first year examination took place in April 1983. This material indicates that the beneficiary's first year began in late 1982 rather than 1981; the record contains no documentation from the University of Bombay to verify the beneficiary's assertion that he began his baccalaureate studies in July 1981.

In addition to the above documentation from the University of Bombay, the petitioner submits several training certificates, showing that the beneficiary has taken several short-term computer training courses in the years following his graduation. Also in the record are three certificates, dated 1981 and 1982, reflecting the beneficiary's completion of courses in "Radio & Television Technology" and the computer programming languages BASIC and COBOL.

The director instructed the petitioner to submit an independent evaluation of the beneficiary's educational credentials. In response, the petitioner has submitted an evaluation in which the evaluator did not indicate that the beneficiary's degree from the university was equivalent to a U.S. baccalaureate. Rather, the evaluator concluded that the petitioner's university studies, standing alone, represent "a three-year program of study transferable to a regionally accredited university in the United States," and the beneficiary's "three years of university-level study and six years of professional experience in Computer Programming are equivalent to the degree, Bachelor of Science in Computer Programming, for employment purposes, from an accredited educational institute in the United States."

In the subsequent denial decision, the director noted that the beneficiary completed three years of university study, and that the independent evaluator did not indicate that the beneficiary's three year degree is equivalent to a U.S. baccalaureate. Rather, the evaluator considered the beneficiary to hold the equivalent of a baccalaureate only by factoring in six years of employment experience that followed the beneficiary's graduation from the University of Bombay. The director stated that the beneficiary's education, non-university training, and employment experience, taken together, amount to "the 'functional' equivalent of a bachelor's degree in

Computer Programming, not the specific degree. Functional equivalents are not acceptable education credentials for immigrant petitions." The director concluded "it does not appear the beneficiary possesses the required degree or equivalent degree required by the labor certification," and denied the petition because the beneficiary does not meet the minimum requirements for the job.

On appeal, counsel requests reconsideration of the petition under section 203(b)(3)(A)(i) of the Act, and reclassification of the beneficiary as a skilled worker. We acknowledge that, when initially filed, the petitioner had indicated that they sought to classify the beneficiary under section 203(b)(3) of the Act rather than section 203(b)(2), but this classification was later changed because the job offer portion of the labor certification makes it clear that the position requires a member of the professions holding an advanced degree or the equivalent. Reclassification of the petition will not overcome the grounds of denial, because regardless of the classification sought, it remains that the labor certification lists minimum job requirements that this beneficiary cannot meet. Reclassification of the petition does not alter the minimum requirements of the position. If the position does not, in fact, require either a master's degree or five years of post-baccalaureate experience, and the petitioner is willing to hire a worker with only three years of university education, the question immediately arises as to why the labor certification lists inaccurate and/or inflated requirements. The petition cannot be approved.

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.