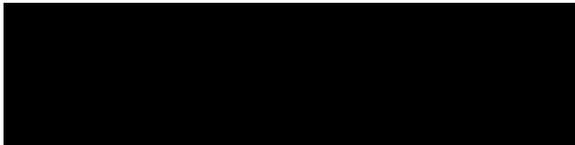


U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

B5

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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



File: EAC 01 234 54017 Office: VERMONT SERVICE CENTER

Date: MAR 19 2003

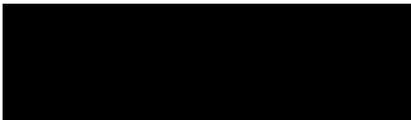
IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



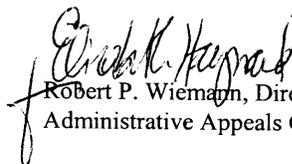
INSTRUCTIONS:

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 petition was denied by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner is a software development company and provider of information technology services that seeks to employ the beneficiary 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 the beneficiary does not possess an advanced degree or its equivalent, and therefore the beneficiary does not qualify for the classification sought.

On appeal, counsel does not dispute the director's finding but asserts that the director should have considered the petition under a lesser classification, as the petitioner had requested.

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).

In *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1971), the Immigration and Naturalization Service (now the Bureau) held that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. In cases involving a labor certification, the petition's filing date is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). In this proceeding, the Department of Labor accepted the labor certification application on November 24, 2000.

The petitioner does not claim that the beneficiary holds an advanced degree. Rather, the petitioner has attempted to establish the beneficiary's eligibility via post-baccalaureate experience equivalent to a master's degree. Part A ("Offer of Employment) of the labor certification application, Form ETA-750, indicates that the position requires a master's degree in Engineering, Mathematics, Computer Science or Technology, but that the petitioner "will accept a Bachelor's Degree plus five years of work experience as equivalent to a Master's Degree." This assertion is similar to the regulatory definition of the equivalent of a master's degree, although the regulations specifically require that the five years of experience must be post-baccalaureate experience. The labor certification contains no such requirement.

The beneficiary earned a "Diploma in Civil Engineering" in May 1992, and a "Bachelor's of Engineering," also in Civil Engineering, in June 1996. The petitioner has submitted an independent evaluation of the beneficiary's credentials. The evaluator states that the beneficiary "attained the equivalent of a Bachelor of Science Degree in Engineering, with coursework in Computer Science, from an accredited institution of higher education in the United States."

To establish the beneficiary's required five years of experience, the petitioner has submitted letters from the beneficiary's former employers. One of these letters, from [REDACTED] of Datasoft

Computers, indicates that the beneficiary “was employed by our organization from September 1994 to Jan 1996 as a Programmer on a full time basis.” This work experience is non-qualifying, because pursuant to 8 C.F.R. § 204.5(k)(2), qualifying work experience must be post-baccalaureate. The beneficiary did not receive his bachelor’s degree until June 1996.

Given the June 1996 date of the beneficiary’s baccalaureate degree, and the November 2000 filing date of the petition, it is mathematically impossible for the beneficiary to have accumulated five years of qualifying post-baccalaureate experience as of the filing date. The director advised the petitioner of this deficiency on September 27, 2001. In response, counsel maintains that “the beneficiary has more than five years and five months of progressively responsible work experience in the field of Computer Science,” and therefore “it is clear from the enclosed documentation and explanation that the beneficiary qualifies for the offered position.” Counsel has requested “favorable adjudication of [the] petition . . . filed on behalf of [the beneficiary] as a Professional with a baccalaureate degree.” The petitioner, too, has requested that the petition be considered “under the Third Preference Employment Based Category.” Significantly, these requests came prior to the denial of the petition.

The director denied the petition, repeating that the beneficiary cannot possibly have accumulated five years of post-baccalaureate experience between June 1996 and November 2000. The director did not mention the petitioner’s request for a change of classification. Counsel asserts, on appeal, that the director should have considered the petition under one of the lower classifications defined by section 203(b)(3) of the Act, as the petitioner had requested prior to the denial. (If no such request had been made prior to the denial, then the request would not represent a viable appellate strategy.) We repeat here the observation that the labor certification form does not indicate that the job requires five years of post-baccalaureate experience in lieu of a master’s degree; it simply requires a bachelor’s degree and five years of experience. The omission of the word “post-baccalaureate” could be an impediment to classification under section 203(b)(2) of the Act, but under section 203(b)(3) of the Act, this omission gives the job description additional flexibility. With the removal of the “post-baccalaureate” requirement, the director may permissibly consider the beneficiary’s 1994-1996 employment at Datasoft.

The director’s finding that the beneficiary does not qualify under section 203(b)(2) of the Act stands undisturbed, and indeed the petitioner, on appeal, has not contested this finding. The remand of this petition is limited to a new finding regarding eligibility under section 203(b)(3) of the Act, as the petitioner had duly requested before the rendering of the decision. The director should give due consideration to all evidence presented.

Therefore, this matter will be remanded. The director may request any additional evidence deemed warranted and should allow the petitioner to submit additional evidence in support of its position within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director’s decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.