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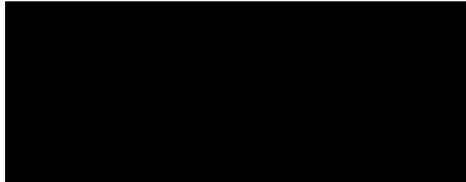
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship and Immigration Services

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FILE: [Redacted]

Office: VERMONT SERVICE CENTER

Date: OCT 20 2004

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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Mari Johnson

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 Administrative Appeals Office on appeal. The decision of the director will be withdrawn, the appeal will be sustained, and the petition will be approved.

The petitioner is a software developing and consulting 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 beneficiary does not meet the job requirements set forth on the labor certification.

On appeal, counsel argues that the beneficiary's baccalaureate degree and five years of progressive experience meet the requirements set forth on the labor certification.

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).

Eligibility in this matter hinges on the beneficiary's qualifications as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); 8 C.F.R. § 204.5(d). Here, the petition's priority date is April 30, 2001.

The beneficiary's eligibility as a member of the professions with the equivalent of an advanced degree is not in dispute; the beneficiary holds a baccalaureate degree in a field relevant to the position sought plus five years of progressive experience. In addition, this particular position requires a member of the professions holding an advanced degree or its equivalent. The issue is whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification. 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.

It is important that the ETA-750 be read as a whole. Block 14 on the ETA-750 Part A contained in the record contains the following information:

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

Education – "Master's Degree**"

Major Field of Study – "Comp science, Engineering (any), Science, Maths [sic]."

Experience – "2" years in job offered.

In this matter, block 14 includes asterisks, both of which refer to this footnoted assertion:

[W]ill consider a Bachelor's Degree with five years of experience in the job offered or as a Systems / Programmer Analyst.

On the ETA 750B, the beneficiary claimed to have worked for ITB India from September 1995 to March 1998 and for HCL Technologies America, Inc. from April 1998 to present. Initially, the petitioner submitted a letter from [REDACTED] Director of ITB India affirming that the beneficiary worked for that company from September 1, 1995 to March 9, 1998. The petitioner also submitted a 2000 Form W-2 issued to the beneficiary by HCL America, Inc. In the request for additional documentation, the director requested evidence of the beneficiary's claimed experience. In response, while counsel did not address this issue in his cover letter, the petitioner submitted a letter from [REDACTED] General Manager of HCL Technologies asserting that the beneficiary worked for that company as a Software Engineer from April 13, 1998 to February 14, 2003. The petitioner also submitted 2001 and 2002 Forms W-2 issued to the beneficiary by HCL America, Inc.

In denying the petition, the director concluded that as the beneficiary was relying on a bachelor's degree plus five years of experience, the petitioner must demonstrate that the beneficiary has a total of seven years of experience to meet the qualifications on the labor certification.

On appeal, the petitioner submits a notice published in the Federal Register, 65 Fed. Reg. 41093 (2000). Under the heading "Relevance of the Alien Beneficiary's Actual Qualifications," the notice provides:

The question is whether the petitioner can include the alien's 5 years' post-baccalaureate progressive experience both to make the alien's baccalaureate the equivalent of a Master's degree and to meet the three years' experience that someone who actually does have a Master's degree must have. The answer will depend on what the ETA-750 actually says. Note that the sample ETA-750s do not require that the three years' experience must follow the receipt of a Master's degree -- only that the applicant must have both the degree and the experience. The ETA-750, therefore, does not preclude someone who just received a Master's degree from qualifying for the position on the basis of pre-Master's experience. By the same reasoning, someone with a baccalaureate degree, and experience that makes it equivalent to a Master's, can qualify based on the pre-Master's equivalency experience. If the beneficiary has a baccalaureate with five years' progressive post baccalaureate experience, the petition should be approved unless the ETA-750 clearly and explicitly requires that the level of experience that a Master's applicant must have must be post-magisterial experience.

The labor certification in this case does not clearly and explicitly require that the two years experience must have been post-magisterial. Thus, the director erred in concluding that the petitioner must show that the beneficiary had seven years of experience.

The petitioner has satisfactorily shown that the beneficiary meets the requirements of the labor certification.

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 October 24, 2003, is withdrawn. The appeal is sustained and the petition is approved.