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U.S. Department of Justice

Immigration and Naturalization Service

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



File: EAC 99 043 51110

Office: VERMONT SERVICE CENTER

Date: MAR 12 2001

IN RE: Petitioner:  
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3).

IN BEHALF OF PETITIONER:



Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

Identification data deleted to  
prevent clearly unwarranted  
invasion of personal privacy.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

Robert P. Wiemann, Acting Director  
Administrative Appeals Office

**DISCUSSION:** The 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 is a software systems firm. It seeks to employ the beneficiary as a network consultant. Accordingly, the petitioner filed the current petition to classify the beneficiary as a professional pursuant to section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(ii). The director determined that the beneficiary did not possess the required educational background, as stated on the Form ETA-750, Application for Alien Employment Certification.

On appeal, counsel argues that the "Services's denial reversing the consistently applied policy without notice or rulemaking is contrary to principles of fair play and fundamental notions of justice."

Section 203(b)(3) of the Immigration and Nationality Act (the Act) states:

(A) In general. - Visas shall be made available, in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraphs (1) and (2), to the following classes of aliens who are not described in paragraph (2):

(i) Skilled workers. - Qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

(ii) Professionals. - Qualified immigrants who hold baccalaureate degrees and who are members of the professions.

As required by 8 CFR 204.5(1)(3)(i), the petitioner has submitted an individual labor certification, Form ETA-750, which has been endorsed by the Department of Labor. At block 14, the labor certification states that a bachelor's degree is the minimum level of education required for a worker to perform the job duties in a satisfactory manner. The labor certification specifically requires that the major field of study be in computer science, network engineering, or the equivalent. The labor certification does not state that any other level of education will satisfy the requirement.

in applied science, and an associate in science from Queensborough Community College. The petitioner also submitted a credentials evaluation from Language Services, Inc., which states that based on three years of formal undergraduate education and three and one half years of experience equating to one year of college credit, the beneficiary has the equivalent of a bachelor's degree in computer science.

After noting that "experience may not be substituted in these proceedings," the director denied the petition. The director found that the beneficiary did not possess a bachelor's degree as required by the labor certification.

On appeal, counsel for the petitioner asserts that the denial is contrary to the Service's long standing practice of approving employment based cases demonstrating equivalence through credentials evaluation that include a combination of education and experience. Counsel further argues that "[t]he regulations cited do not preclude the substitution of experience."

Despite counsel's arguments, the Service will not accept a degree equivalency when a labor certification plainly and expressly requires a candidate with a specific degree. To determine whether a beneficiary is eligible for a third preference immigrant visa, the Service must ascertain whether the alien is in fact qualified for the certified job. In evaluating the beneficiary's qualifications, the Service must look to the job offer portion of the labor certification to determine the required qualifications for the position; the Service may not ignore a term of the labor certification, nor may it impose additional requirements. See Matter of Silver Dragon Chinese Restaurant, 19 I&N Dec. 401, 406 (Comm. 1986). See also Madany v. Smith, 696 F.2d 1008 (D.C. Cir. 1983); K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006 (9th Cir. Cal. 1983); Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey, 661 F.2d 1 (1st Cir. 1981). Here, block 14 of the Form ETA-750 plainly states that a bachelor's degree is the minimum level of education required to adequately perform the certified job. As the beneficiary has not earned a bachelor's degree, he does not qualify for the certified position.

Finally, the Service is not persuaded by the petitioner's fairness argument. Although counsel argues that it would be unfair to hold the petitioner to the terms of the labor certification, it would seem patently unfair for a petitioner to represent to potential United States job applicants that a position requires a bachelor's degree, and then proceed to hire a candidate that does not possess the stipulated level of education.

The beneficiary does not qualify for the proffered position as he does not possess the specific degree required by the labor certification, a bachelor's degree in computer science, or network

engineering. Accordingly, the beneficiary is not eligible for classification under Section 203(b)(3) as either a skilled worker or a professional, based on the current labor certification.

The burden of proving eligibility for the benefit sought remains entirely 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.