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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: [Redacted] Office: NEBRASKA SERVICE CENTER

Date: MAR 22 2001

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 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.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

Identification data deleted to
prevent clear, unwarranted
invasion of personal privacy

DISCUSSION: The employment-based preference immigrant visa petition was denied by the Director, Nebraska Service Center. In the subsequent appeal and motion, the Associate Commissioner for Examinations affirmed the director's decision to deny the visa petition. The matter is now before the Associate Commissioner on a second motion to reopen. The motion will be granted and the previous decisions of the director and the Associate Commissioner will be affirmed.

The petitioner seeks to employ the beneficiary permanently in the United States as a senior system analyst. As required by statute, the petition was accompanied by individual labor certification from the Department of Labor. The director determined that the petitioner had not established that the beneficiary met the petitioner's qualifications for the position as stated in the labor certification as of October 10, 1995, the filing date of the visa petition.

In support of this second motion, counsel states:

The AAU has stated that this case was denied because Mr. [REDACTED] did not have a foreign bachelor's degree. The INS says the labor certification implies that the applicants must have a bachelor's degree or foreign equivalent and because Mr. [REDACTED] does not have the foreign equivalent of a Bachelor's degree the I-140 must be denied. This finding is not supported by the evidence. Mr. [REDACTED] possesses the equivalent of a Bachelor's degree as detailed in affidavits by Dr. [REDACTED] Associate Professor of Computer Science, and Dr. [REDACTED] Department of Mechanical Engineering, University of Illinois. Additionally, equivalency is well recognized by INS in the 3-for-1 rule of H-1B regulation.

Section 203(b) (3) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b) (3), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled or unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The petitioner did not provide any additional documentation in support of its claim that the beneficiary qualified for the position. The petitioner has not established that the beneficiary had a bachelor's degree or equivalent degree in business administration or computer science as of October 10, 1995, the filing date of the visa petition. The beneficiary must meet the requirements of the petitioner as stated on the ETA 750.

The regulation governing classification as H-1B nonimmigrants contain a provision for consideration of experience as equivalent

to education. There is no similar provision for the substitution of experience for education in the immigrant context. A beneficiary who does not meet the requirements of the petitioner as stated on the application for alien employment certification as of the date of filing of the visa petition is ineligible. See Matter of Katigbak, 14 I&N Dec. 45, 49 (Reg. Comm., 1971). The petitioner has not established that the beneficiary met the petitioner's qualifications for the position as stated in the labor certificate as of the petition's filing date. The objection of the Associate Commissioner has not been overcome on motion.

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 met that burden. Accordingly, the previous decisions of the director and the Associate Commissioner will be affirmed, and the petition will be denied.

ORDER: The Associate Commissioner's decision of August 30, 1999 is affirmed. The petition is denied.