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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



File: EAC 01 225 56609

Office: VERMONT SERVICE CENTER

Date: AUG 12 2002

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 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 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 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann
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 Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a computer consultancy and software development company. It seeks to employ the beneficiary permanently as a lead applications systems analyst programmer. As required by statute, the petition is accompanied by an individual labor certification approved by 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.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(i), 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 labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

A labor certification is an integral part of this petition, but the issuance of a labor certification does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the training, education, and experience specified on the labor certification as of the petition's filing date. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is January 14, 1998.

The Application for Alien Employment Certification (Form ETA 750) indicated that the position of lead applications systems analyst programmer required a Bachelor's degree in computer science, engineering, mathematics, or technology, and two years of experience in the job offered, or two years of experience in the related occupation of software engineer, systems analyst, programmer analyst, or consultant.

The director determined that the petitioner had not established that the beneficiary had the required Bachelor's degree and denied the petition.

On appeal, counsel argues that:

Petitioner acknowledges that, under the regulations, work experience may not be combined to meet the minimum educational requirements as listed on the labor certification. However, because [the beneficiary] possessed over seven years of professional experience as

of the filing of the labor certification, he qualifies as a Skilled Worker under the third preference employment based category. Because professionals and skilled workers share the same preference and the same numerical allocation, and are both subject to the labor certification requirement, the Petitioner respectfully requests your kind discretion in approving the I-140 petition under the Skilled Worker category.

The record contains an educational evaluation from [REDACTED] Evaluations and Consulting, which states that the beneficiary has a bachelor's degree in commerce from the [REDACTED]. It further states that the beneficiary's academic qualifications and three years of progressive work experience in the computer field are transferable toward a Bachelor's degree in Computer Information Systems from a regionally accredited university in the United States.

Counsel states that the petitioner has submitted documentation to establish that the beneficiary had a combination of education and experience to meet the requirements set forth in the Form ETA 750 prior to the filing date of the petition. The three year experience for one year of education rule used in the evaluation, however, is applicable to nonimmigrant H1B petitions, not immigrant petitions. The beneficiary is required to have a bachelor's degree on the Form ETA 750. The petitioner's actual minimum requirements could have been clarified or changed before the ETA 750 was certified by the Department of Labor. Since that was not done, the director's decision to deny the petition must be affirmed.

The issue here is whether the beneficiary met all of the requirements stated by the petitioner in block #14 of the labor certification as of the day it was filed with the Department of Labor. The petitioner has not established that the beneficiary had a bachelor's degree in computer science, engineering, mathematics, or technology on January 14, 1998. Therefore, the petition may not be approved.

Regarding counsel's request to approve the petition based on the category of skilled worker, it is noted that regardless of whether a petitioner files as a skilled worker under section 203(b)(3)(A)(i) of the Act, or as a professional under section 203(b)(3)(A)(ii) of the Act, the petitioner must establish that the beneficiary possessed the required training, education, and experience as of the date that the request for labor certification was accepted for processing by the Department of Labor.

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.