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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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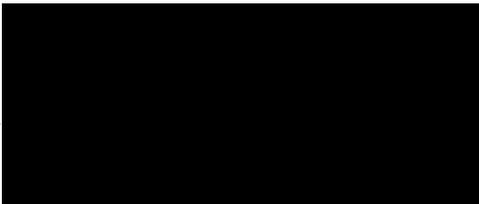


File: EAC 01 084 50891 Office: VERMONT SERVICE CENTER Date: MAY 14 2002

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner on appeal. The appeal will be dismissed.

The petitioner manufactures, sells, and services electrical electronic software. It seeks to employ the beneficiary permanently in the United States as a software development engineer. 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 had the requisite experience as of the petition's filing date.

On appeal, counsel submits a brief.

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.

The issue to be considered in this proceeding is that 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 May 25, 2000.

The Application for Alien Employment Certification (Form ETA 750) indicated that in order to perform the duties of the position, the beneficiary must possess two years of experience in the job offered, or two years of experience in the related occupation of software development.

The director determined that the petitioner had not shown that the beneficiary possessed the requisite experience in the job offered.

On appeal, counsel argues that:

We appeal the denial and re-assert that the beneficiary possesses the required two years of experience by applying the 3 for 1 equivalency formula for equating education and experience in the determination of professional status for purpose of H-1 visas as set forth by the INS at Title 8, Code of Federal Regulations, part 214.2(h)(4)(iii)(D)(5). The equivalency formula specifically states that "for equivalence to an advanced (or Masters) degree, the alien must have a baccalaureate

degree followed by at least five years of experience in the specialty."

The director, however, correctly noted that "[n]o additional letters from employers were submitted to show the beneficiary has more than six months of the required two years of experience."

The letter from the petitioner merely states that the beneficiary had been performing the duties of the position for six months as of the priority date. As the record does not contain an employment history from the beneficiary's previous employer, it can not be determined if the beneficiary had two years of experience in the job offered as of the filing date of the petition.

The three year experience for one year of education rule used in the evaluation 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 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.