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U.S. Department of Justice

Immigration and Naturalization Service

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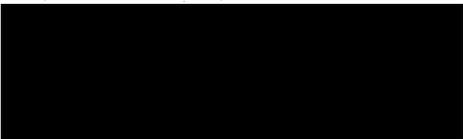
Date: NOV 13 2002

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 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, Director
Administrative Appeals Office

DISCUSSION: The employment-based 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 an information systems technology firm. It seeks to employ the beneficiary permanently in the United States as a programmer/analyst pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3). As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the beneficiary does not possess the minimum requirements listed on the labor certification.

Section 203(b) of the Act states in pertinent part:

(3) Skilled workers, professionals, and other workers. –

(A) In General. – Visas shall be made available . . . to the following classes of aliens
....:

(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.

Service regulations at 8 C.F.R. 204.5(l)(3)(ii) state, in pertinent part:

(B) Skilled workers. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification. . . . The minimum requirements for this classification are at least two years of training or experience.

(C) Professionals. If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation.

Part A of the Form ETA 750 labor certification describes the offer of employment. The minimum education, training and experience requirements for the position are set forth in block 14 of the ETA 750A. In this instance, the petitioner did not list any training requirement, and indicated "0" for the number of years of experience required. Under "education," the petitioner indicated that the position requires four years of college, with a bachelor's degree in a "computer related" major field of study. The ETA 750A does not provide for any substitutions or equivalencies in this regard.

Part B of the ETA 750 is the alien's statement of qualifications. The only postsecondary education claimed by the beneficiary is a Bachelor of Business Administration degree, which the beneficiary earned at National Taiwan University. The beneficiary's official transcript from that university lists very few courses (such as "Data Processing") that appear from their titles to pertain to computers. The beneficiary does have experience in computer-related occupations, but the petitioner did not indicate that any such experience was necessary for the position, or that such experience could serve in place of a degree in a computer-related field.

On August 24, 2000, the director instructed the petitioner to "submit evidence that the beneficiary has a computer related bachelor's degree as indicated on the ETA 750 form. The record shows that the beneficiary has a business administration degree; and not a computer degree."

In response, counsel states that the beneficiary "obtained a Bachelor Degree in Business Administration with the minor in Information Systems Management." Counsel submits a new copy of the beneficiary's college transcript, with seven courses highlighted. Some of these courses, such as "Calculus" and "Production and Operations Management," do not appear to be directly related to computers. Even if we were to conclude that the seven courses fulfill a minor in Information Systems Management (the transcript identifies no such minor), it remains that the ETA 750 requires a computer related *major* field of study.

Counsel states:

Under 1990 INS regulations, an alien's eligibility as a professional may be established by showing that he or she holds a bachelor's degree in a specific occupational specialty, or the equivalent, has an unrestricted state license to immediately practice the profession, or has education, training and/or professional experience that is equivalent to the training acquired by the attainment of a bachelor's degree.

Three years of such training and/or experience will be considered the equivalent of one year of college-level training. The "three-to-one" formula was retained by the Service in the 1991 regulations with respect to petitions involving a specialty occupation.

(Emphasis in original.) Counsel does not specify the "1990 INS regulations" and "1991 regulations" to which he refers. Specific phrases in counsel's statement, however, match language found in sections of 8 C.F.R. 214.2(h)(4)(iii). Those regulations specifically refer to temporary

employees, seeking H-1B nonimmigrant visas. The nonimmigrant regulations at 8 C.F.R. 214.2(h) are in no way binding with regard to immigrant petitions covered under 8 C.F.R. 204.5(l). In terms of the pertinent regulations (i.e. the regulations that actually apply to the classification sought in this proceeding), 8 C.F.R. 204.5(l)(3)(ii)(B) and (C) indicate that the beneficiary must possess the minimum qualifications specified on the labor certification.

The director denied the petition, maintaining that the petitioner's "seven computer related courses do not equate to a computer related bachelor's degree." The director also observed that the H-1B regulations cited by counsel are without effect in this proceeding because the beneficiary does not seek H-1B classification. The director also quoted, in full, the above-cited regulation at 8 C.F.R. 204.5(l)(3)(ii)(C).

On appeal, counsel states that the director "arbitrarily changed the category of I-140 petition from skilled worker (8 C.F.R. 204.5(l)(2))¹ to professional (8 C.F.R. 204.5(l)(3)(ii)) and so denied the petition without justification." The record reflects that, when the petitioner filed the petition, counsel's accompanying cover letter specified that the petitioner sought to classify the beneficiary as a skilled worker rather than as a professional. The director's reliance on regulations pertaining to professionals, however, was far from arbitrary.

As is clear from the statute and regulations cited above, the minimum requirement for a skilled worker position is "at least two years of training or experience." While the regulation at 8 C.F.R. 204.5(l)(2) provides that relevant post-secondary education may be considered as training for the purposes of qualifying as a skilled worker, on the ETA 750A, the petitioner left the "training" section entirely blank, and wrote "0" for the number of years of experience required. Thus, on its face, the position described does not meet the statutory and regulatory requirements for a skilled worker petition.

A professional position, on the other hand, must require "the minimum of a baccalaureate degree." Given that such a degree is, in fact, the only requirement shown on the ETA 750A, the director was amply justified in treating the petition as a request to classify the beneficiary as a professional rather than as a skilled worker.

Even if we were to limit our consideration to 8 C.F.R. 204.5(l)(3)(ii)(B), which pertains only to skilled workers, the petitioner would still have to demonstrate "that the alien meets the educational, training or experience, and any other requirements of the individual labor certification." The only such requirement stated on the labor certification is a bachelor's degree in a computer related field, and the beneficiary does not possess any such degree.

To be eligible for preference visa classification under section 203(b)(3) of the Act, 8 U.S.C. 1153(b)(3), the beneficiary must possess all of the qualifications specified by the petitioner on the approved labor certification as of the filing date of the labor certification application. Matter of

¹ While counsel repeatedly refers to 8 C.F.R. 204.5(l)(2) as the section of the regulations pertaining to skilled workers, that section of the regulation consists entirely of definitions of terms, including both "skilled worker" and "professional."

Wing's Tea House, 16 I&A 158 (Reg. Comm. 1977). The petitioner, on the labor certification form, did not indicate that it would accept a certain amount of training and/or experience in lieu of a computer related bachelor's degree. Consequently, whatever licensure, experience, and other qualifications the beneficiary may possess, those factors are irrelevant to the central issue of whether the beneficiary possesses the qualifications set forth on the ETA 750. Whether we consider the position to be for a professional or (as counsel demands) for a skilled worker, the beneficiary does not meet the minimum requirements stated on the labor certification. The petition, therefore, cannot be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.