

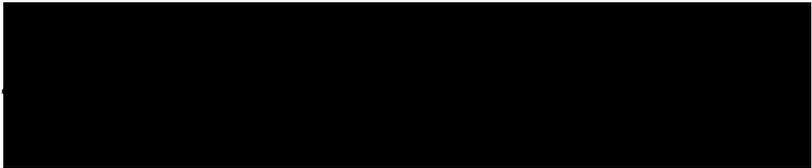
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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: LIN 04 083 52057 Office: NEBRASKA SERVICE CENTER Date: JUN 28 2005

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

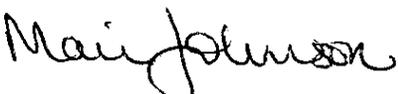
PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.


& Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner is a land grant university that seeks to employ the beneficiary as a UNIX system administrator. As required by statute, the petition was accompanied by certification from the Department of Labor. The director found that the position described in the labor certification does not require a member of the professions holding an advanced degree.

Section 203(b)(2)(A) of the Act provides that visas shall be made available to qualified immigrants who are members of the professions holding advanced degrees or their equivalent, and whose services in the professions or business are sought by an employer in the United States.

In a proceeding involving an approved labor certification, such as the present proceeding, Citizenship and Immigration Services regulations at 8 C.F.R. § 204.5(k)(4)(i) require that the job offer portion of the labor certification must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.

8 C.F.R. § 204.5(k)(2) defines “advanced degree” as any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master’s degree. Therefore, the labor certification must show that the position requires, at a minimum, a degree above that of baccalaureate, or a baccalaureate degree followed by at least five years of progressive experience.

Part A of the Form ETA-750 application for labor certification instructs the intending employer to list the minimum years of education, college degree (if applicable), and years of experience required for the position. The Form ETA-750A as submitted by the petitioner contained no specific information about the education or experience required for the position. Instead, the petitioner marked the education and experience sections with asterisks, and wrote “*see following page for details.” The labor certification, as submitted with the petition, had no following page.

The director instructed the petitioner to submit the missing page from the labor certification. In response, the petitioner submits “an exact copy of the requested page that was attached to the original ETA750 form.” The form describes the systems and software used in the position, but it does not specify the level of education or the amount of experience (measured in months and years) required for the job. Thus, the labor certification does not indicate that the position requires an advanced degree or at least five years of progressive post-baccalaureate experience in the specialty.

Form ETA-750B, Statement of Qualifications of Alien, indicates that the beneficiary earned a bachelor’s degree in Architecture in May 1996 and a master’s degree in computer science in December 2001. The beneficiary’s first full-time employment in the field of computer science began in September 2002. Thus, the beneficiary clearly did not possess at least five years of post-baccalaureate experience in the specialty at the time the petitioner applied for labor certification in August 2003.

The director denied the petition because the labor certification does not show that the position requires at least an advanced degree or five years of progressive post-baccalaureate experience. The director also noted that

the labor certification does not specify the length of experience required. On appeal, [REDACTED] the petitioner's immigration representative for employment, states that she inadvertently sought the wrong classification for the beneficiary. [REDACTED] explains that, when filling out the I-140 petition form, she checked the box for "member of the professions holding an advanced degree" because the beneficiary has a master's degree; she mistakenly thought "this category was for aliens who hold an advanced degree . . . rather than for aliens whose job requires an advanced degree." [REDACTED] asks that the petition be considered under section 203(b)(3) of the Act as a petition for a member of the professions.

On appeal, the petitioner does not contest the director's finding that the position, as described on the labor certification, does not require an advanced degree or its equivalent in post-baccalaureate experience. We therefore affirm the director's decision.

With regard to the petitioner's request for a change of classification, there exists no provision in the statute, regulations, or case law to permit a petitioner to change the requested immigrant classification after the petition has been denied. The petition has already been fully adjudicated. If the petitioner seeks a second full adjudication, under a different set of standards, then the proper course of action is for the petitioner to re-file the petition, with appropriate fee and all required evidence, under the newly requested classification.

This decision is not the proper forum for an initial determination as to whether or not the position described in the labor certification qualifies as a professional position for the purposes of section 203(b)(3) of the Act. We note, however, that 8 C.F.R. § 204.5(l)(3)(i) specifies: "The job offer portion of an individual labor certification for a professional . . . must demonstrate that the job requires the minimum of a baccalaureate degree." As noted above, the job offer portion of the labor certification in this instance does not list any minimum education requirement. Therefore, the labor certification as it now stands would not appear to be conducive to approval of a petition seeking to classify the beneficiary as a professional. Because the labor certification lists no specific minimum educational or experience requirements, the document cannot support a finding of eligibility under any classification that involves such requirements.

We note [REDACTED] assertion that "a bachelor's degree is a logical requirement for this position," and her submission of background materials to that effect. By regulation, however, we must consider the requirements as shown on the labor certification. The petitioner cannot argue, as [REDACTED] does here, that we should take into account additional requirements that the petitioner neglected to include on the labor certification. If the petitioner wishes for these additional requirements to be taken into consideration, then the proper course of action would appear to be for the petitioner to apply for a new labor certification.

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. Accordingly, the decision of the director will not be disturbed and the appeal will be dismissed.

ORDER: The appeal is dismissed.