

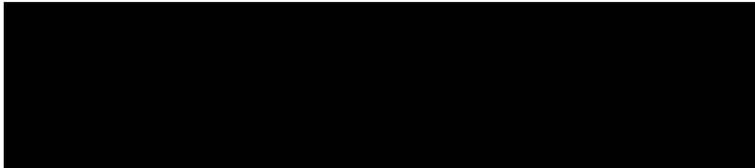


U.S. Citizenship
and Immigration
Services

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

B5

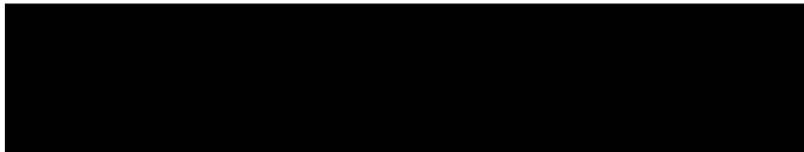


FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: NOV 05 2009
LIN 07 115 54589

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:



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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained; the petition will be approved.

The petitioner is a computer consulting company. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL), accompanied the petition. The director determined that the job offered did not require a member of the professions.

On appeal, counsel asserts that the proffered position of software engineer does require the attainment of at least a baccalaureate degree. Counsel also states that, although the Form ETA 750 states that a degree in “any field” is acceptable, the petitioner actually required qualified applicants to possess “a degree in a relevant field of study that allows entry into the software engineering field.”

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: “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. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.” *Id.*

The regulation at 8 C.F.R. § 204.5(k)(4) also provides the following:

(i) **General.** Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor’s Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien’s occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. **The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.**

(Bold emphasis added.)

The AAO notes that the beneficiary in this matter has a four-year Bachelor of Engineering from Bharathiar University which has been evaluated to be the equivalent of a Bachelor of Science degree in Engineering awarded by an accredited institution of higher education in the United States. In addition, the record shows that the beneficiary has more than five years of professional experience in the specialty. At issue is whether the job requires a member of the professions and whether the beneficiary is a member of that profession. The key to determining the job qualifications is found on

the Form ETA 750, block 14. This section of the application for alien labor certification describes the terms and conditions of the job offered. It is important that the Form ETA 750 be read as a whole.

The job title listed on the Form ETA 750, block 9, is “software engineer.” In this matter, block 14 reflects that the position requires either a master’s degree plus one year of experience or, in the alternative, a bachelor’s degree plus five years of experience. No particular field of study is required with respect to the bachelor’s or master’s degree. The required experience must be in the position offered or in “any computer occupation.”

As defined at Section 101(a)(32) of the act, profession “shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.” The regulation at 8 C.F.R. § 204.5(k)(2), in pertinent part, defines “profession” as follows:

[O]ne of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

The director acknowledged these definitions, but then relied on *Matter of Shin*, 11 I&N Dec. 686 (Dist. Dir. 1966) and *Matter of Palanky*, 12 I&N Dec. 66 (Regl. Commr. 1966), for the proposition that the degree must be related to the field. We note that in *Matter of Shin*, 11 I&N Dec. at 688, the District Director did not state that a degree in and of itself was insufficient; rather, the “knowledge acquired must also be of [a] nature that is a realistic prerequisite to entry into the particular field of endeavor.” The following discussion, however, was limited to the level of education required, not the major field of study. Moreover, *Matter of Palanky*, 12 I&N Dec. at 68, addressed an occupation that did not require a full baccalaureate. Most significantly, these cases predate the regulation at 8 C.F.R. § 204.5(k)(2). Therefore, the AAO must defer to the definition in that regulation, which states only that a profession must require a baccalaureate for entry into the occupation.

The AAO emphasizes, however, that in considering whether the job requires a member of the professions or whether the beneficiary is a member of that profession, the AAO relies the definition of “profession” at 8 C.F.R. § 204.5(k)(2). This definition is used by USCIS in determining whether an alien is qualified for the classification sought in this matter, a determination that is solely under USCIS jurisdiction. See *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983).¹ In other words, DOL certification does not bind the AAO in determinations of eligibility for a visa classification. Moreover, the regulation provides that a profession is an occupation for which a United States baccalaureate degree or its foreign equivalent is the *minimum* requirement for *entry* into the occupation. Thus, some professions may require *more* than a baccalaureate in an unspecified field for *entry* into that particular profession. In such cases, the

¹ *But cf. Hoosier Care, Inc. v. Chertoff*, 482 F. 3d 987 (7th Cir. 2007) relating to a lesser classification than the one involved in this matter and relying on the regulation at 8 C.F.R. § 204.5(l)(4), a provision that does not relate to the classification sought here.

director would be justified in considering, independent of whether the alien meets the job requirements certified by DOL and is a member of some other profession, whether the alien can truly be considered a member of the profession associated with the occupation certified by DOL. The AAO notes that being a member of the professions does not entitle the alien to classification as a professional if he does not seek to continue working in that profession. *See Matter of Shah*, 17 I&N Dec. 244, 246-47 (Regl. Commr. 1977).

The job certified by DOL in this matter, software engineer,² requires a bachelor's degree and the director did not reference a source of information suggesting that a minimum of a baccalaureate was not a normal requirement for the occupation. The Occupational Outlook Handbook (OOH) published by DOL is a primary source of information as to the normal minimum requirements for an occupation.³ With respect to software engineers, the OOH (2008-09 ed.) states:

Most employers prefer applicants who have at least a bachelor's degree and broad knowledge of, and experience with, a variety of computer systems and technologies. The usual college major for applications software engineers is computer science or software engineering. Systems software engineers often study computer science or computer information systems. Graduate degrees are preferred for some of the more complex jobs.⁴

This language reveals that while "computer science or computer information systems" is an important area of study for systems software engineers, a degree in either field is not necessarily required for entry into the occupation. Ultimately, the typical requirement for the proffered position is "at least a bachelor's degree," although a specific field of study is not always necessary.

Further, it is noted that the beneficiary possesses a degree in a relevant field as well as more than five years of professional experience in the specialty. The beneficiary was awarded a Bachelor of Engineering degree from Bharathiar University in 1997. Transcripts in the record show that, while attending Bharathiar University, the beneficiary completed courses in the fields of math, science, engineering, and computer science. The record also contains letters from previous employers showing that the beneficiary has over five years of experience in the specialty. Specifically, the beneficiary was employed as a software programmer and system analyst with Vaasum Soft Tech Private Limited from January 1998 to February 2002; as an Analyst Programmer with Phillip Securities PTE LTD from December 2002 to May 2003; as a Senior System Analyst with Vaasum Soft Tech Private Limited from August 2003 to October 2004; and as a Programmer Analyst with US Tech Solutions beginning in November 2005. The beneficiary's Bachelor of Engineering degree and her professional experience as a software programmer and analyst are consistent with the requirements of the occupation of Computer Software Engineer as stated in the OOH.

² The occupational code assigned to the position by the DOL was 15-1032, Computer Software Engineer, System Software.

³ The Occupational Outlook Handbook (2008-2009 ed.) is available online at <http://www.bls.gov/OCO/>.

⁴ *Id.* at <http://www.bls.gov/oco/ocos267.htm>.

In light of the above, the petitioner has established that the position certified by the DOL is a profession.⁵

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden.

ORDER: The decision of the director is withdrawn. The appeal is sustained and the petition is approved.

⁵ It is noted that the director did not reference a source of information suggesting that a minimum of a baccalaureate in any field of study was not a normal requirement for the occupation.