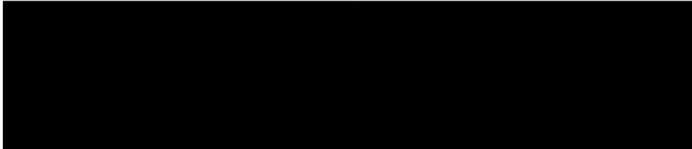




U.S. Department of Justice
Immigration and Naturalization Service

B5

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



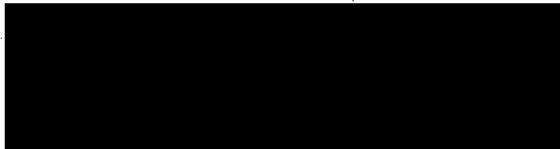
File: WAC 98 014 52233 Office: CALIFORNIA SERVICE CENTER

Date: AUG 22 2000

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)

IN BEHALF OF PETITIONER:



Public Copy

Identifying data added to prevent clearly unwarranted invasion of personal privacy

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

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations 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 computer consultant. It seeks to employ the beneficiary permanently in the United States as a system analyst/programmer. The director found that the position does not require the services of a member of the professions holding an advanced degree.

On appeal, counsel submits a duplicate petition, except that it is marked as one for a skilled worker.

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

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at 8 C.F.R. 204.5(k)(4)(i) states, in pertinent part:

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. . . .

The petitioner indicated on the Form ETA-750 application for labor certification that the position in question required a bachelor of science degree in computer science or engineering and four years of experience in the job offered. Therefore, the position does not require an advanced degree or its equivalent.

The director denied the petition on December 14, 1997, based on the above grounds. On appeal, counsel maintains that "a typing error inadvertently occurred and the Petition was intended to be filed under Section 203(b)(3)(A)(ii) Professional, therefore, the attached Petition is marked in Part 2(e) A skilled worker or professional."

Counsel's argument is not supported by the record. A letter from the petitioner accompanying the petition as originally filed refers to the petition as: "Second Employment based preference petition." There is no provision in statute, regulation, or administrative case law which permits a petitioner to change the classification sought after a petition has been filed. As the Service cannot consider alternative classifications during or after the adjudication of a petition, the beneficiary's eligibility for a separate classification will not be considered.

In this case, the petitioner indicates that the education requirement for the proffered position is a Bachelor's degree. Four years of experience is required. As the petitioner has not established that the proffered position requires either a professional holding an advanced degree or its equivalent, or a person of exceptional ability, the petition may not be approved under section 203(b)(2) of the Act.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.