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U.S. Department of Justice

Immigration and Naturalization Service

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

[redacted]

File: EAC 00 131 53801 Office: VERMONT SERVICE CENTER Date: JUN 18 2002

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3).

IN BEHALF OF PETITIONER:

[redacted]

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

Helen E. Crawford for

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was denied by the Director, Vermont Service Center. The director's decision to deny the petition was affirmed by the Associate Commissioner for Examinations on appeal. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be granted. The previous decision of the Associate Commissioner will be affirmed and the petition will be denied.

The petitioner is a company involved in software consultation and development. It seeks to employ the beneficiary permanently in the United States as a software 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 met the petitioner's qualifications for the position as stated in the labor certification as of the petition's filing date.

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.

Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

A labor certification is an integral part of this petition, but the issuance of a labor certification does not mandate the approval of the relating petition. 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 November 1, 1999.

The Application for Alien Employment Certification (Form ETA 750) indicated that the position of software engineer required a Bachelor's degree in engineering (any), computer science, mathematics, or arts or information science, and five years of experience in the related occupation of software analyst.

The director denied the petition noting that the beneficiary did not have the required Bachelor's degree.

On motion, counsel argues that:

> In response to the notice dated January 22, 2001, the office of the undersigned obtained an evaluation from the International Credential Education and Translation

> Services evaluating the beneficiary's education alone, and asserting the fact that the beneficiary had an equivalent of a Bachelor's Degree.
>
> A copy of the educational evaluation, and the entire educational certificates/correspondence that was submitted therewith is being forwarded to your office for ready reference.
>
> Inasmuch, it is maintained that the Beneficiary had a Bachelor's Degree as stated in the Labor Certification, and that the beneficiary does qualify for the job offered. It is therefore requested that the petition submitted by the petitioner be approved, and the office of the undersigned be advised of the approval of the same.

Counsel's argument is not persuasive. The issue here is whether the beneficiary met all of the requirements stated by the petitioner in block #14 of the labor certification as of the day it was filed with the Department of Labor.

There is nothing in the record which actually shows that the beneficiary received a Bachelor's degree diploma. Counsel does, however, provide an evaluation which states that "calculations based on course duration and composition in the Master of Commerce Degree program, considered together with his prior studies at [redacted] indicate that [redacted] satisfied similar requirements to the completion of a Baschelor of Arts Degree from an accredited institution of tertiary education in the United States." While a combination of all of the beneficiary's education may be similar to the rewquirements of a bachelor's degree, they do not rise to the level necessitated by the labor certification.

Despite counsel's arguments, the Service will not accept a degree equivalency when a labor certification plainly and expressly requires a candidate with a specific degree. To determine whether a beneficiary is eligible for a third preference immigrant visa, the Service must ascertain whether the alien is in fact qualified for the certified job. In evaluating the beneficiary's qualifications, the Service must look to the job offer portion of the labor certification to determine the required qualifications for the position; the Service may not ignore a term of the labor certification, nor may it impose additional requirements. *See* Matter of Silver Dragon Chinese Restaurant, 19 I&N Dec. 401, 406 (Comm. 1986). *See also* Madany v. Smith, 696 F.2d 1008 (D.C. Cir. 1983); K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006 (9th Cir. Cal. 1983); Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey, 661 F.2d 1 (1st Cir. 1981). Here, block 14 of the Form ETA-750 plainly states that a bachelor's degree is the minimum

level of education required to adequately perform the certified job. As the beneficiary has not earned a bachelor's degree, he does not qualify for the certified position.

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 Associate Commissioner's decision of October 1, 2001 is affirmed. The petition is denied.