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U.S. Department of Justice

Immigration and Naturalization Service

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

[redacted]

2 8 JUN 2002

File: [redacted] Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

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, Nebraska 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 firm which develops and manufactures electronics. It seeks to employ the beneficiary permanently in the United States as a production supervisor. 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 16, 1998.

The Application for Alien Employment Certification (Form ETA 750) indicated that the position of production supervisor required an Associate's degree in electronics or quality control and two years of experience in the job offered, or two years of experience in the related occupation of electronics, electrical/Quality Control Technician.

The director denied the petition noting that the beneficiary did not have the required Associate's degree in electronics or quality control.

On motion, counsel argues that:

> There is no gainsaying the Service's duty to investigate the facts in each employment-based immigrant visa petition case pursuant to Section 203(b) of the INA. The statute, however, requires the Service to exercise its decision-making power in consultation with the Secretary of Labor. The AAO's March 12 decision is disturbing because it appears to ignore the role of the DOL in the employment-based immigrant visa petition process. The NSC decision of August 3, 2000 was based in its words on the following belief: "The ETA-750 that supports this immigrant petition indicates that the petitioner indicated to the Department of Labor that an associate's degree in electronics or quality control is the minimum education needed for a worker to perform satisfactorily the duties of the proffered position." The AAO's decision does not appear to be concerned with what the DOL's thinking on this matter is. The center director's views have become all important. By basing its decision on the apparent absolute authority of the center director to interpret the labor certification form and its stated minimum requirements, the AAO appears to have shifted the basis of the Service's denial and implicitly accepted that the DOL would not have certified this application had it believed that an associate's degree was a necessary prerequisite for the proffered position. It should be asked then where is the AAO's due regard for the opinion of the DOL in this matter which the INA mandates.

Although the advisory opinions of other Government agencies are given considerable weight, the Service has authority to make the final decision about a beneficiary's eligibility for occupational preference classification. The Department of Labor is responsible for decisions about the availability of United States workers and the effect of a prospective employee's employment on wages and working conditions. The Department of Labor's decisions concerning these factors, however, do not limit the Service's authority regarding eligibility for occupational preference classification. Therefore, the issuance of a labor certification does not necessarily mean a visa petition will be approved.

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. The petitioner has not established that the beneficiary had an Associate's degree in electronics or quality control on November 16, 1998. Therefore, the petition may not be approved.

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 March 12, 2001 is affirmed. The petition is denied.