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U.S. Department of Justice

Immigration and Naturalization Service

Identification data deleted to prevent clearly unwarranted invasion of personal privacy

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

[redacted]

File: EAC 00 152 52756 Office: VERMONT SERVICE CENTER Date: MAY 15 2002

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, 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 computer software engineering and systems development company. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. 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 December 22, 1999.

The Application for Alien Employment Certification (Form ETA 750) indicated that the position of programmer analyst required a Bachelor's degree in computer science, math, engineering, or science, or the equivalent, and one year of experience in the job offered, or one year of experience in the related occupation of software engineer/systems analyst.

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

On motion, the petitioner argues that:

> This appeal turns on a single, narrow issue of law: Does the rule that alien beneficiary experience cannot be substituted for years of college education apply to all EB3 petitions or only to EB3 "professional" petitions? The AAO decision applied the rule to all EB3 petitions:
>
> The three years of experience for one year of education rule used in the evaluation, however, is applicable to nonimmigrant H-1B petitions, not immigrant petitions.

The petitioner incorrectly suggests on motion that this petition must be approved because the beneficiary was previously granted nonimmigrant classification as an H-1B nonimmigrant based on a degree equivalency. A degree equivalency, whether based on work experience or a combination of lesser degrees, will not suffice to qualify a beneficiary as an immigrant under section 203(b)(3)(A)(i) or (ii) of the Act when the labor certification requires a specific degree. On the other hand, the nonimmigrant regulations at 8 CFR 214.2(h)(4)(iii)(D)(5) provide that progressively responsible work experience may be substituted for a year of education in a nonimmigrant H-1B petition. Neither the statute nor the regulations allow for the "equivalency" of a bachelor's degree for this immigrant classification. For this immigrant classification, a beneficiary must possess an actual baccalaureate degree when the labor certification requires a bachelor's degree as the required level of education.

Finally, the fact that the director reviewed the petition as requesting classification as a professional, pursuant to section 203(b)(3)(A)(ii), is not fatal to his decision. Regardless of whether a petitioner files as a skilled worker under section 203(b)(3)(A)(i) of the Act, or as a professional under section 203(b)(3)(A)(ii) of the Act, the petitioner must establish that the beneficiary possessed the required training, education, and experience as of the date that the request for labor certification was accepted for processing by the Department of Labor.

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 August 21, 2001 is affirmed. The petition is denied.