

SUMMARY: This notice informs concerned parties (prospective employers who have filed certain EB-2 immigrant visa petitions) of the opportunity to file untimely motions to reconsider Service decisions denying EB-2 immigrant visa petitions. The Service is publishing this notice in accordance with an order issued May 4, 2000, by the United States District Court for the Northern District of California (Chesney, J.), in the case entitled *Chintakuntla v. INS*, No. C99-5211 MMC (N.D.Cal.). This notice is necessary to ensure that all persons who are able to file motions to reconsider in accordance with the Court's order have notice of their right to do so. **DATES:** This notice is effective July 3, 2000.

203(b)(2) of the Immigration and Nationality Act (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.

Petitions seeking the classification of alien beneficiaries as EB-2 advanced degree professionals present a number of issues for Service Center adjudicators. This memorandum provides guidance regarding such decisions.

What is an Advanced Degree?

An advanced degree is a U.S. academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 CFR 204.5(k)(2).

What is the Equivalent of an Advanced Degree?

The equivalent of an advanced degree is either a U.S. baccalaureate or foreign equivalent degree followed by at least five years of progressive experience in the specialty. So, an alien beneficiary who does not actually hold an advanced degree may still qualify as an EB-2 professional if he or she has the equivalent of an advanced degree.

There are several ways in which an alien seeking EB-2 The classification may satisfy the advanced-degree requirement. The simplest is by possessing a U.S. academic or professional degree above baccalaureate. In the alternative, the foreign equivalent of such a degree is equally acceptable.

An alien with a U.S. or foreign equivalent baccalaureate degree who does not possess an advanced degree may still meet this requirement if the baccalaureate-level degree is followed by at least five years of "progressive experience" in the specialty.\ 2\

What Elements Must Be Established Before an EB-2 Petition for an Advanced Degree Professional Can Be Approved?

Two critical elements must be established before an advanced degree EB-2 petition can be approved. First, the position itself must require a member of the professions holding an advanced degree. Second, the alien must possess an advanced degree as shown by a master's degree or its equivalent. The threshold issue regarding the position itself appears to be the most troublesome in adjudicating EB-2 petitions for advanced degree professionals.

The key to making this determination is found on Form ETA-750

Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. An adjudicator must review the job requirements contained in blocks 14 and 15 of the ETA-750 and determine whether the position requires an advanced degree professional.

Deciding whether the position requires an advanced degree professional is independent of whether the alien beneficiary is himself an advanced degree professional. If the job itself does not require an advanced degree professional, the petition must be denied, even if the alien beneficiary actually is an advanced degree professional. Also, the petition must be denied if the alien beneficiary is not an advanced degree professional, even if the job itself needs an advanced degree professional.

Whether the alien beneficiary actually possesses the advanced degree should be demonstrated by evidence in the form of a transcript from the institution that granted the advanced degree. An adjudicator must similarly consider the baccalaureate transcript and the alien's post-baccalaureate experience for the alien beneficiary claiming the equivalent to an advanced degree.

Does the Job To Be Filled by the Alien Beneficiary Require an Advanced Degree?

A petitioner seeking classification for an EB-2 advanced degree professional must clearly demonstrate that the position requires a member of the professions holding an advanced degree. In other words, blocks 14 and 15 of the ETA-750 must establish that the position requires an employee with either a master's degree or a U.S. baccalaureate or foreign equivalent degree followed by at least five years of progressive experience in the specialty.

It should be emphasized that the mere absence of the word "progressive" from blocks 14 and 15 on the ETA-750 is not grounds for denial of the petition if the required experience is in fact progressive in nature. Adjudicators should examine the experience required for the position as described in block 13 of the ETA-750 in order to determine whether such experience is progressive.

What Exactly is Progressive Experience?

"Progressive experience" is not defined by statute or regulation. Its plain meaning within the context of EB-2 adjudications is relatively simple: employment experience that reveals progress, moves forward, and advances toward increasingly complex or responsible duties. In short, progressive experience is demonstrated by advancing levels of responsibility and knowledge in the specialty.

Recognizing progressive experience in blocks 14 and 15 of the ETA-750, however, is not so simple. Much of the uncertainty concerning such determinations involves petitions for highly

technical positions, which invariably describe required experience in highly technical terms. Such descriptions may be difficult to understand for anyone outside that specific industry.

Adjudicators who encounter these types of descriptions should request that petitioners provide, to the extent possible, plain-English explanations of the experience required. Such descriptions may take the form of a supplemental statement filed with the Service Centers indicating why five years of post-baccalaureate and progressive experience would be necessary to perform successfully the duties set forth in highly technical job descriptions. The supplemental statement should be an affidavit (or other statement under penalty of perjury) from some person within the petitioning firm who has relevant knowledge concerning the minimum acceptable qualifications for the position involved in the Form I-140. It is incumbent upon the petitioner to describe the position offered in such a way so that an adjudicator can reasonably determine whether the job actually requires an advanced degree or, in the alternative, five years of post-baccalaureate experience that is progressive in nature.

It is reasonable to infer that highly technical positions are progressive in nature due to the constant state of change in their industries. This is not to say, however, that five years of post-baccalaureate experience in a highly technical position automatically translates to an advanced degree in every case. As with any adjudication, a petition seeking classification for an EB-2 advanced degree professional should be decided on a case-by-case basis.

How Can These Requirements Be Shown?

The terms, "MA," "MS," "Master's Degree or Equivalent" and "Bachelor's degree with five years of progressive experience," all equate to the educational requirements of a member of the professions holding an advanced degree. The threshold for granting EB-2 classification will be satisfied when any of these terms appear in block 14.

It is also important to read the ETA-750 as a whole. In particular, if the education requirement in block 14 includes an asterisk (*) or other footnote, the information included in the note must be considered in determining whether the educational requirement, as a whole, demonstrates that an advanced degree or the equivalent is the least acceptable qualification for the position.

As long as the minimum requirement for the job offered is master's degree or the equivalent, the position should be found to need a member of the professions holding an advanced degree. This is true even if several variations of this requirement are stated.

Examples

The following are examples of actual statements contained at blocks 14 and 15 of the ETA-750. They are noway exhaustive. Their inclusion here is intended to simply illustrate concepts

discussed in this memorandum.

Position 1: Staff Software Engineer

ETA 750 Item 14: Education--B.S. (or foreign equiv.) comp. science, elec. eng., or connected field.

Experience--5 years job offered or 5 years related occupation software engineer.

ETA 750 Item 15: Exp. must include: design & development of major software subsystems; RDBMS internals; operating system internals; complex systems software design; symmetric multiprocessing and large scale network systems.

It is unclear whether this job requires 5 years of experience following receipt of the baccalaureate. For this reason, the adjudicator should request that the petitioner provide a supplemental statement clarifying whether the position requires five years of post-baccalaureate experience that is truly progressive in nature. If the supplemental statement establishes that the minimum qualifications for the position require a member of the professions holding an advanced degree and, assuming the beneficiary possesses these qualifications, the petition should be approved.

Position 2: Senior Software Engineer

ETA 750 Item 14: Education--MScS or equiv. * * *. Major Field of Study--Computer Science or related field.

Experience--3 years in job offered or 3 years in related occupation of Software Engineer.

ETA 750 Item 15: C/C++ Programming; RDBMS Design * * * Will consider candidates with BSCS and 5 years experience as Software Engineer.

Similarly, it is unclear in this position as well whether this job requires 5 years of post-baccalaureate experience as a Software Engineer. Because of the added requirement of a Master of Science in Computer Science degree or its equivalent, however, the underlying petition may be approvable. So, the adjudicator should request that the petitioner provide a supplemental statement clarifying whether the position requires five years of post-baccalaureate experience that is truly progressive in nature. If the supplemental statement establishes that the minimum qualifications for the position require a member of the professions holding an advanced degree and, assuming the beneficiary possesses these qualifications, the petition should be approved.

Position 3: Software Engineer

ETA 750 Item 14: Education--Master's or equivalent* Major Field of Study**

Experience--3 years in job offered or in the related occupation of software engineer, systems engineer, or programmer/analyst.

ETA 750 Item 15: * Bachelor's degree in Computer Science, Electrical Engineering or academic equivalent, and 5 years of progressive experience will substitute for Master's degree in Computer Science and 3 years of such experience.

** Computer Science, Electrical Engineering or academic equivalent.

This position clearly requires a master's degree or 5 years of progressive experience. So, the position calls for a member of the professions holding an advanced degree. Again, assuming the beneficiary possesses these qualifications, the underlying petition should be approved.

Relevance of the Alien Beneficiary's Actual Qualifications

The second and third examples raise an additional question to be decided before approving some petitions--those in which the alien the beneficiary does not actually have a Master's degree. The ETA-750 in each of those cases requires that a candidate with a Master's degree must have three years' experience, but that a baccalaureate with five years' experience is acceptable. The question is whether the petitioner can include the alien's 5 years' post-baccalaureate progressive experience both to make the alien's baccalaureate the equivalent of a Master's degree and to meet the three years' experience that someone who actually does have a Master's degree must have. The answer will depend on what the ETA-750 actually says. Note that the sample ETA-750s do not require that the three years' experience must follow the receipt of a Master's degree--only that the applicant must have both the degree and the experience. The ETA-750, therefore, does not preclude someone who just received a Master's degree from qualifying for the position on the basis of pre-Master's experience. By the same reasoning, someone with a baccalaureate degree, and experience that makes it equivalent to a Master's, can qualify based on the pre-Master's equivalency experience. If the beneficiary has a baccalaureate with five years' progressive post baccalaureate experience, the petition should be approved unless the ETA-750 clearly and explicitly requires that the level of experience that a Master's applicant must have must be post-magisterial experience.

If the ETA-750 does require that the experience must have been post-magisterial experience, and the alien beneficiary just has the baccalaureate plus five years' progressive post-baccalaureate, then the alien beneficiary cannot meet the post-magisterial experience requirement. Therefore, the petition should be denied, not because the alien beneficiary is not an advance degree professional, but because the alien does not meet the actual qualifications as stated on the ETA-750. See *K.R.K. Irvine, Inc., v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Matter of Wing's Tea House*, 16 I & N Dec. 158 (INS 1977).

Where Do Adjudicators Find Help Concerning EB-2 Petitions for Advanced Degree Professionals?

EB-2 petitions for advanced degree professionals involving unusually complex or novel issues of law or fact can be certified to the Administrative Appeals Office pursuant to 8 CFR 103.4. Questions concerning this guidance can be addressed to Senior Adjudications Officer [officer's name deleted] through channels via cc:Mail.

