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U.S. Citizenship
and Immigration
Services

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FILE:

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Office: NEBRASKA SERVICE CENTER

Date:

DEC 01 2008

IN RE:

Petitioner:

Beneficiary:

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)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition and reaffirmed that decision on motion. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an importer, distributor, fabricator and installer of slab. It seeks to employ the beneficiary permanently in the United States as a human resource manager pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to aliens of exceptional ability and members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the job offered did not require a member of the professions holding an advanced degree.

On appeal, counsel asserts that the selection of section 203(b)(2) of the Act was a “clerical typo error” and requests that the petition be adjudicated under the lesser classification set forth at section 203(b)(3)(A)(ii) of the Act.

Upon review, the director’s decision was proper under the law and regulations. As will be discussed in detail, a petitioner may not make material changes to a petition after adjudication in order to establish eligibility. Additionally, the Act prohibits Citizenship and Immigration Services (CIS) from providing a petitioner with multiple adjudications for a single petition with a single fee.

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)(2) defines an advanced degree as follows:

[A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master’s degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate degree or a foreign equivalent degree.

The regulation at 8 C.F.R. § 204.5(k)(4) provides the following:

(i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. **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 or an alien of exceptional ability.**

(Bold emphasis added.)

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

In this matter, Part H, line 4, of the labor certification reflects that a Bachelor's degree is the minimum level of education required. Line 6 reflects that 24 months of experience are required. Line 8 reflects that no combination of education or experience is acceptable in the alternative.

CIS 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*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). CIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *See generally Madany*, 696 F.2d at 1015. The only rational manner by which CIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). CIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added). CIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

The Form I-140, Immigrant Petition for Alien Worker, was filed concurrently with the beneficiary's Form I-485, Application to Register Permanent Residence or Adjust Status, on December 22, 2006. The petitioner checked box "d" under Part 2 of the Form I-140 petition requesting classification as a member of the professions holding an advanced degree or an alien of exceptional ability. The petitioner also signed the Form I-140 under penalty of perjury, certifying that "this petition and the evidence submitted with it are all true and correct."

On October 11, 2007, the director requested that the petitioner clarify the classification being sought. In response, counsel asserted that the ETA Form 9089 only listed the minimum requirements but that the beneficiary actually had a baccalaureate plus almost 12 years of experience, thus qualifying him for classification under section 203(b)(2) of the Act. Counsel stated: "The Employer prefers that this I-140 Application be classified under Part 2, Section d, which is more appropriate, reasonable and fair."

Thus, the director considered the petition under section 203(b)(2) of the Act and concluded that the job did not require a member of the professions holding an advanced degree.

On motion, counsel acknowledged that the petition was initially filed under section 203(b)(2) of the Act. Counsel then concurred with the director's analysis of the petition under that classification. Counsel then asserted that the classification requested was "a typographical error that was not detected." Finally, counsel requested that the petition be considered under section 203(b)(3)(A)(ii) of the Act.

The director noted the explicit language used by counsel in response to the director's request for additional evidence and reaffirmed the initial denial.

On appeal, counsel reasserts that the request for classification under section 203(b)(2) of the Act was a clerical error.

Counsel is not persuasive. The record reflects that the director specifically afforded the petitioner an opportunity to clarify the classification being sought. Counsel's response acknowledges that the ETA Form 9089 only required a baccalaureate plus two years of experience and states, in two places, that the employer still wished consideration under section 203(b)(2) of the Act based on the alien's own experience.

The burden is on the petitioner to select the appropriate classification rather than to rely on the director to infer or second-guess the petitioner's intended classification. As discussed, the Form I-140 petition was clearly marked under Part 2 as a petition filed for classification as a "member of the professions holding an advanced degree or an alien of exceptional ability." The petitioner signed the Form I-140 under penalty of perjury, attesting that the information on the form was correct. As the petition was unaccompanied by instructions from counsel or the petitioner specifying otherwise, the director properly adjudicated the petition pursuant to section 203(b)(2) of the Act. Further, counsel expressly requested consideration pursuant to section 203(b)(2) of the Act in two separate places in response to the director's request for additional evidence.

A request for a change of classification will not be entertained for a petition that has already been adjudicated. A post-adjudication alteration of the requested visa classification constitutes a material change. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Commr. 1998). In addition, the Ninth Circuit has determined that once CIS concludes that an alien is not eligible for

the specifically requested classification, the agency is not required to consider, *sua sponte*, whether the alien is eligible for an alternate classification. *Brazil Quality Stones, Inc., v. Chertoff*, Slip Copy, 2008 WL 2743927 (9th Cir. July 10, 2008).

Furthermore, CIS is statutorily prohibited from providing a petitioner with multiple adjudications for a single petition with a single fee. The initial filing fee for the Form I-140 covered the cost of the director's adjudication of the I-140 petition. Pursuant to section 286(m) of the Act, 8 U.S.C. § 1356, CIS is required to recover the full cost of adjudication. In addition to the statutory requirement, Office of Management and Budget (OMB) Circular A-25 requires that CIS recover all direct and indirect costs of providing a good, resource, or service.¹ If the petitioner now seeks to classify the beneficiary as a skilled worker pursuant to section 203(b)(3) of the Act, then it must file a separate Form I-140 petition requesting the new classification. On appeal, counsel has cited no statute, regulation, or standing precedent that permits a petitioner to change the classification of a petition once a decision has been rendered by the director.

As quoted above, 8 C.F.R. § 204.5(k)(2) defines an advanced degree as including a baccalaureate plus five years of post-baccalaureate progressive experience. The regulation at 8 C.F.R. § 204.5(k)(4) mandates that the job require a member of the profession holding an advanced degree. The position certified by DOL requires only a baccalaureate plus two years of experience. Thus, we affirm the director's denial of the petition under the classification sought.

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 met that burden.

This denial is without prejudice to the filing of a new petition under a lesser classification.

ORDER: The appeal is dismissed.

¹ See <http://www.whitehouse.gov/omb/circulars/a025/a025.html>, accessed on November 28, 2008, copy incorporated into the record of proceeding.