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Office: NEBRASKA SERVICE CENTER

Date: JAN 23 2008

IN RE:

Petitioner:

Beneficiary



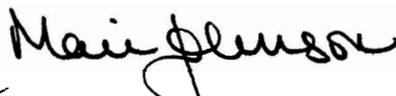
PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained; the petition will be approved.

The petitioner is a Korean Bank. It seeks to employ the beneficiary permanently in the United States as a business operations specialist pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). 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.

On appeal, counsel asserts the job requirements stated on the ETA Form 9089 are standard and that the specialized knowledge necessary for the position is acquired from the experience. Counsel relies on federal court cases that address the authority of Citizenship and Immigration Services (CIS) to interpret the needs of the employer as expressed on the alien employment certification application. These cases do not address the issue before us, the authority of CIS to determine whether a job requires an advanced degree professional pursuant to 8 C.F.R. § 204.5(k)(4). For the reasons discussed below, however, the cases on which the director relied predate the regulatory definitions of “profession” on which the director should have relied. The director did not suggest that the occupation certified by DOL does not normally require a baccalaureate. Moreover, the director did not suggest that the profession closest to the certified job requires a degree in a specific field or narrow range of fields for entry into that profession. Thus, we withdraw the director’s finding that the job did not require a *member of the professions* holding an advanced degree.

In pertinent part, section 203(b)(2) of 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. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: “A United States baccalaureate degree or a foreign equivalent 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 or a foreign equivalent degree.” *Id.*

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)(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 baccalaureate degree is the minimum level of education required. On line 4-B, the petitioner indicated that the major field of study required was "immaterial." Line 6 indicates that five years of experience in the job offered is required. Line 8 reflects that no combination of education or experience is acceptable in the alternative. Line 9 reflects that a foreign educational equivalent is acceptable. Finally, line 10 reflects that experience in an alternate occupation is not acceptable.

As defined at section 101(a)(32) of the Act, profession "shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The regulation at 8 C.F.R. § 204.5(k)(2), in pertinent part, defines "profession" as follows:

[O]ne of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

The director acknowledged these definitions, but then relied on *Matter of Shin*, 11 I&N Dec. 686 (Dist. Dir. 1966) and *Matter of Palanky*, 12 I&N Dec. 66 (Regl. Commr. 1966), for the proposition that the degree must be related to the field. We note that in *Matter of Shin*, 11 I&N Dec. at 688, the District Director did state that a degree in and of itself was insufficient; rather, the "knowledge acquired must also be of [a] nature that is a realistic prerequisite to entry into the particular field of endeavor." The following discussion, however, was limited to the level of education required, not the major field of study. Moreover, *Matter of Palanky*, 12 I&N Dec. at 68, addressed an occupation that did not require a full baccalaureate. Most significantly, these cases predate the regulation at 8 C.F.R. § 204.5(k)(2). Therefore, we must defer to the definition in that regulation, which states

only that a profession must require a baccalaureate for entry into the occupation and does not specify that the baccalaureate need be in a related field.

Our interpretation of the regulation is bolstered by the statutory definition of professionals, which includes teachers in elementary schools. According to the Department of Labor's Occupational Outlook Handbook, available on the Bureau of Labor Statistics's website at www.bls.gov, an elementary school teacher must have a bachelor's degree but not necessarily in a particular field.

We emphasize, however, that in considering whether the beneficiary in this matter is a member of the professions we rely on our own definition of "profession" at 8 C.F.R. § 204.5(k)(2). This definition is used by CIS in determining whether an alien is qualified for the classification sought in this matter, a determination that is solely under CIS jurisdiction. See *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983).¹ In other words, DOL certification does not bind us in determinations of eligibility for a visa classification. Moreover, the regulation provides that a profession is an occupation for which a United States baccalaureate degree or its foreign equivalent is the *minimum* requirement for *entry* into the occupation. Thus, some professions may require *more* than a baccalaureate in an unspecified field for *entry* into that particular profession. In such cases, the director would be justified in considering, independent of whether the alien meets the job requirements certified by DOL and is a member of some other profession, whether the alien can truly be considered a member of the profession most related to the occupation certified by DOL.

The job as certified by DOL in this matter requires a baccalaureate and the director did not reference a source of information suggesting that the baccalaureate requirement was not a normal requirement for the occupation. The Occupational Outlook Handbook (OOH) published by DOL is a primary source of information as to the normal minimum requirements for an occupation. In this matter, however, the Occupational Outlook Handbook, available online at www.bls.gov, and O*NET, available online at www.online.onetcenter.org, do not provide comprehensive information about business operations specialists, SOC code 13-1199.99. We have reviewed O*NET OnLine under this SOC code, which includes business operations specialists and "all other" titles that include "a wide range of characteristics which do not fit into one of the detailed O*NET-SOC occupations." According to the data provided, which derives from DOL's Bureau of Labor Statistics, 42 percent of respondents in this occupational classification have baccalaureate degrees. While this percentage is *far* below what we would consider to demonstrate a "required" credential for entry into the occupation, we cannot ignore that this data includes a "wide range" of jobs.

Where primary evidence is not available, secondary evidence is acceptable. 8 C.F.R. § 103.2(b). On appeal, the petitioner submitted seven job advertisements for business operations specialists, all requiring at least a baccalaureate, with some requiring or preferring a Master's degree. While seven

¹ *But cf. Hoosier Care, Inc. v. Chertoff*, 482 F. 3d 987 (7th Cir. 2007) relating to a lesser classification than the one involved in this matter and relying on the regulation at 8 C.F.R. § 204.5(l)(4), a provision that does not relate to the classification sought here.

job advertisements do not rule out the possibility that the occupation does not require a baccalaureate, nothing in the record, the OOH or the O*NET explicitly contradicts the conclusion that the occupation does require a baccalaureate. Thus, we are satisfied that the job does require a member of the professions as defined at 8 C.F.R. § 204.5(k)(2).

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden.

ORDER: The decision of the director is withdrawn. The appeal is sustained and the petition is approved.