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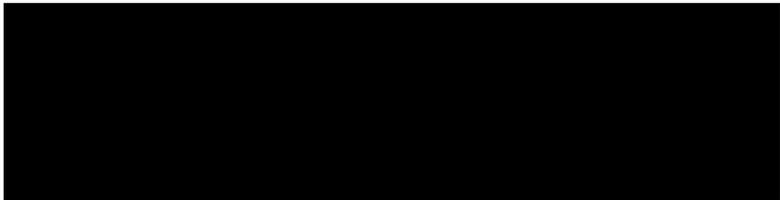
U.S. Department of Homeland Security
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U.S. Citizenship
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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: JAN 28 2008
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IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

SELF-REPRESENTED

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 dismissed.

The petitioner is a medical institute. It seeks to employ the beneficiary permanently in the United States as a medical technology instructor 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. Upon reviewing the petition, the director determined that the beneficiary was not eligible for the classification sought. The director further implied that the beneficiary does not meet the job requirements specified on the ETA Form 9089, although the director mistakenly referenced that form by its previous form number, Form ETA 750.¹

On appeal, the petitioner asserts that the beneficiary's "academic credentials" are equivalent to a U.S. baccalaureate and that the beneficiary has over five years of additional experience. The petitioner submits the beneficiary's transcripts for her laboratory technician credentials and previously unclaimed studies at the National School of Commerce. The petitioner submitted a new evaluation equating the beneficiary's credentials in the aggregate as equivalent to a U.S. Bachelor of Science in Clinical Laboratory Science.

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.*

The beneficiary possesses three foreign degrees certifying her as a Laboratory Technician in 1977 after two years of study, as a Specialist in Clinical Bacteriology in 1998 after one year of study and as a Specialist in Hemotherapy in 2000 after two years of study. These credentials are issued by the Directorate General of Schools, Buenos Aires. The beneficiary also completed a course at the Hospital Italiano of Buenos Aires. On appeal, the petitioner submits for the first time evidence that the beneficiary completed four years of education at the National School of Commerce. The transcript for the education at the National School of Commerce does not indicate that a degree was awarded. The petitioner also submits an evaluation of all of the beneficiary's academic credentials in the aggregate, listing the beneficiary's education at the National School of Commerce as a "Degree of Commerce Specialist."

¹ The ETA Form 9089 replaced the Form ETA 750 as of March 28, 2005. *Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System*, 69 Fed. Reg. 77386 (Dec. 27, 2004).

The issues are whether any of the beneficiary's credentials could be considered a foreign degree equivalent to a U.S. baccalaureate degree or, if not, whether it is appropriate to consider the beneficiary's education in the aggregate or her years of experience in addition to that education. We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

Eligibility for the Classification Sought

As noted above, the ETA Form 9089 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i); 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *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).²

The petitioner initially submitted an evaluation by [REDACTED] of AUAP Credential Evaluation Services. [REDACTED] does not explicitly evaluate the beneficiary's academic credentials independently of her experience. Rather, he equates all of her education and employment in the aggregate to a Master of Science Degree in Clinical Laboratory Science (MSCLS). Notably, Dr. [REDACTED] includes the following two notes:

³ USCIS and US Institutions of Higher Education give University credit equivalency for skilled work experience. The Immigration Service promulgated an equivalency ratio of three year[s] of work to one year of college training for Bachelor's degree equivalence. We professionally consider that the Bachelor's degree equivalency was attained after 6 year[s] of work employment as Laboratory Technician, i.e. at the end of the year 1985.

⁴ The Immigration Service also promulgated that five years of qualified work after the Bachelor's degree may be equivalent to the completion of a US Master degree. Through the above-mentioned documents, we counted fifteen years (15) of qualified work experience after the Bachelor's degree as Medical [L]aboratory Technician, Medical Laboratory technologist to end as Chief of Phlebotomy Division. This last position included the scientific supervision of ten (10) Medical Laboratory Technicians. The various certificate totaling 1975 hours proves that the experience

² *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.

was definitely at the Master's degree level. Therefore, the combination of prior studies and work experience gives [the beneficiary] the equivalency of a Master of Science from a regionally accredited institution of the United States of America.

On appeal, the petitioner submits a new evaluation from [redacted] evaluating only the beneficiary's academic credentials. This new evaluation, which includes the beneficiary's education at the National School of Commerce not previously claimed, concludes that all of her education in the aggregate is equivalent to a U.S. Bachelor Science Degree in Clinical Laboratory Science. [redacted] does not assert that any single degree obtained by the beneficiary is equivalent to a U.S. baccalaureate.

Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795. *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)). For the reasons discussed below, [redacted] is not persuasive that the beneficiary's credentials are sufficient for the classification sought in this matter.

The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (October 26, 1990). In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a

professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991)(emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Regl. Commr. 1977). Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of lesser degrees and/or experience, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree." As stated above, in his initial evaluation, ██████████ asserts that CIS allows for experience to substitute for education. In order to have the experience and education equating to an advanced degree under section 203(b)(2) of the Act, however, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. 8 C.F.R. § 204.5(k)(2)(defining "advanced degree" for purposes of the immigrant benefit sought in this matter). *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(defining "equivalence to completion of a college degree" for purposes of a *nonimmigrant* visa classification.) As explained in the preamble to the final rule for advanced degree professionals, the immigrant classification sought in this matter, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor's degree may qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3), as a skilled worker with more than two years of training and experience. 56 Fed. Reg. at 60900.

Because the beneficiary does not have at least a "United States baccalaureate degree or a foreign equivalent degree," her remaining experience cannot be considered towards the equivalency of an advanced degree pursuant to section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2).

Qualifications for the Job Offered

Even if we considered the beneficiary's education in the aggregate as sufficiently equivalent to a U.S. baccalaureate, and we do not, the beneficiary does not meet the job requirements on the alien employment certification. Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(5) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: “The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.” *Tongatapu*, 736 F. 2d at 1309.

When determining whether a beneficiary is eligible for a preference immigrant visa, CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. CIS must examine “the language of the labor certification job requirements” in order to determine what the job requires. *Id.* 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. *See 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 alien employment certification application form. *See id.* at 834. 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 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, lines 4-A and 4-C, of the alien employment certification reflect that a Master of Science degree in “Clinical Laboratory” is the minimum level of education required. Line 6 reflects that three years of experience in the job offered, medical technology instructor, is also required. Significantly, 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.

There is no ambiguity in the requirements stated above. The job requires a Master’s degree and does not permit the substitution of experience in lieu of this educational requirement. Despite the fact that the beneficiary indicated on Part J of the ETA Form 9089 that she has a Master’s degree, she has never earned this academic credential. Rather, the beneficiary in this matter relies on her academic credentials that have been evaluated, in the aggregate, as equivalent to a U.S. baccalaureate and her

many years of experience. We reiterate, however, that the petitioner stated without ambiguity on the ETA Form 9089 that the job requires the actual academic degree rather than permitting the substitution of experience. Thus, the beneficiary is clearly ineligible for the position certified by DOL.

The beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," and, thus, does not qualify for preference visa classification under section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2). In addition, the beneficiary does not meet the job requirements on the alien employment certification. For these reasons, considered both in sum and as separate grounds for denial, 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 met that burden.

ORDER: The appeal is dismissed.