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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:



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 cosmetic and beauty aid marketing company. It seeks to employ the beneficiary permanently in the United States as a graphic artist/designer 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 an alien of exceptional ability or an advanced degree professional.

On appeal, counsel asserts that the director abused his discretion by denying the petition without first offering the petitioner an opportunity to amend the classification checked on the petition. Counsel submits a policy memorandum and minutes from a July 10, 2006 liaison meeting between the American Immigration Lawyers Association (AILA) and the Texas Service Center. For the reasons discussed below, we find that the director was not obligated to offer the petitioner an opportunity to request a lesser classification.

In addition, the AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). Beyond the decision of the director, the petitioner has not submitted sufficient evidence that the beneficiary has the required bachelor’s degree in computer graphics.

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.)

When evaluating the job requirements, Citizenship and Immigration Services (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 and 4-B, of the alien employment certification reflects that a bachelor's degree in computer graphics is the minimum level of education required. Line 6 reflects that no experience is required. Line 7 indicates that no alternate field of study is acceptable. Line 8 reflects that no combination of education or experience is acceptable in the alternative. Line 9 reflects that a foreign educational equivalent is not acceptable.

On Part 2 of the Form I-140 petition, the petitioner checked box "d," "A member of the professions holding an advanced degree or an alien of exceptional ability (who is NOT seeking a National Interest Waiver)." The petitioner submitted its own letter in support of the petition, asserting that it would employ the beneficiary "in an exceptional ability level position of Graphic Artist." On page 2, the petitioner asserts that the job requires "at least 5 years of progressive experience" and on page 3 the petitioner indicates it is looking for a "proven graphic artist/illustrator with minimum of 4 to 5 years of experience in women/fashion/beauty product design based industry." We note that the level of experience considered exceptional is 10 years. 8 C.F.R. § 204.5(k)(3)(ii)(B).

The director concluded that the position did not require an advanced degree, defined as an academic or professional degree or a foreign equivalent degree above that of baccalaureate or a U.S. baccalaureate or foreign equivalent degree followed by at least five years of progressive experience. 8 C.F.R. § 204.5(k)(2). The director further concluded that the position did not require an alien of exceptional ability, defined as a degree of expertise significantly above that ordinarily encountered in the field. *Id.*

On appeal, counsel does not challenge the director's finding that the job certified does not require an advanced degree professional or an alien of exceptional ability. While counsel focuses on the issue of advanced degree professional and its similarity to professionals pursuant to section 203(b)(3) of the Act, 8 U.S.C. § 1153(b)(3), the petitioner actually sought to classify the beneficiary as an alien of exceptional ability, not an advanced degree professional. In addition to the definition of exceptional ability cited above, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) provides six evidentiary criteria, of which an alien must meet at least three. At no point did the petitioner ever explain how the job requires an alien that meets at least three of those criteria or, in fact, how the beneficiary in this matter meets any of those criteria.

Rather than challenge the director's findings relating to the classification sought, counsel contends on appeal that the director should have first offered an opportunity to amend or withdraw the petition. Counsel asserts that, upon approval of the ETA Form 9089 by DOL, prior counsel "mistakenly filed an I-140 petition requesting classification as EB-2." Counsel appears to concede that the director might not have been able to approve the petition in a lesser classification without the filing of a new petition, but asserts that the petitioner should have been offered the opportunity to withdraw the EB-2 petition filed under section 203(b)(2)(A) of the Act, 8 U.S.C. § 1153(b)(2)(A) and file a new one in a lesser classification (EB-3) under section 203(b)(3) of the Act, 8 U.S.C. § 1153(b)(3).

Counsel relies on a memorandum by William R. Yates, Associate Director of Operations, "Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)," HQOPRD 70/2 (Feb. 16, 2005)(hereinafter "Yates Memo"). This memorandum indicates that no RFE or NOID is necessary where the evidence reflects an "inability to meet a basic statutory or regulatory requirement" but recommends a NOID when "the case appears to be ineligible for approval but not necessarily incurable." Counsel asserts that "there was no evidence that the beneficiary was ineligible per se for approval of an employment-based I-140 petition that requires an approved labor certification application, namely, in the EB-3 professional category." Counsel acknowledges that the director cannot consider every Form I-140 under every possible classification, but asserts discretion is appropriate in this matter because "the requirements of the EB-3 professional category and the EB-2 holder of an advanced degree category are so similar, differing only in the level of the degree required."

Counsel then relies on the above-mentioned minutes from the liaison meeting, which confirm that an employer can file multiple Form I-140 petitions for the same beneficiary using the same alien employment certification. Counsel infers from this policy that an employer can also withdraw a

Form I-140 petition and refile in a different category. The same minutes, reflect that the Texas Service Center advised, in response to a question explicitly about a petition filed under the EB-2 category that should have been filed under the EB-3 category, that an RFE would be issued “when the officer can surmise that there may be a clerical error.” The Texas Service Center director further advised that if the clerical error was not caught prior to denial, “a new filing will be required.”

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9<sup>th</sup> Cir. 1987)(administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9<sup>th</sup> Cir. 2001)(unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even CIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5<sup>th</sup> Cir. 2000)(An agency’s internal guidelines “neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.”)

Counsel has cited no law or regulation, and we know of none, that would require the director to consider a petition explicitly filed seeking classification pursuant to section 203(b)(2)(A) of the Act, 8 U.S.C. § 1153(b)(2), under section 203(b)(3) of the Act, 8 U.S.C. § 1153(b)(3), prior to denial. In fact, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Commr. 1998).

Even if we were to consider the memo and meeting minutes submitted, they do not support counsel’s assertion that the director abused his discretion by denying the petition without first offering an opportunity to amend the petition or withdraw it. The Yates Memo clearly provides that a petition may be denied where the evidence demonstrates that a regulatory requirement cannot be met. The Yates Memo does not suggest that amending the classification sought is the type of “cure” that a NOID is designed to permit or otherwise imply that a NOID is appropriate to allow a petitioner to withdraw a misfiled petition or amend the classification sought. The minutes from the liaison meeting suggest that the director may, as a courtesy, inquire as to whether a lesser classification is sought where it appears that there is a clerical error. In this matter, there is no indication that the petitioner made a clerical error in requesting classification pursuant to section 203(b)(2)(A) of the Act, 8 U.S.C. § 1153(b)(2)(A). As stated above, the petitioner explicitly stated in the cover letter that it sought to classify the beneficiary as an alien of exceptional ability.

In light of the above, the director did not err in denying the petition without first offering an opportunity to amend the petition or withdraw it.

Beyond the decision of the director, the petitioner has not established that the beneficiary qualifies for the job certified by DOL. On appeal, counsel asserts that DOL accepted the beneficiary’s degree as sufficient to meet the job requirements.

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 (9<sup>th</sup> Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983).

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 (9<sup>th</sup> 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 that the legacy Immigration and Naturalization Service (INS), now Citizenship and Immigration Services (CIS), "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.

Thus, counsel is not persuasive that DOL's approval of the alien employment certification precludes us from examining whether the alien meets the certified job requirements.

The petitioner asserted in its initial cover letter that the job required a “BA or BFA in graphic design, illustration, advertising or any compatible [sic].” At issue, however, are the job requirements certified by DOL. As stated above, the petitioner indicated on the approved ETA Form 9089 that the job requires a bachelor’s degree in “computer graphics.” In addition, the petitioner explicitly indicated that no alternative field would be acceptable in Part H, Line 7.

The petitioner submitted the beneficiary’s Bachelor of Fine Arts in Illustration from the Art Center College of Design. The transcript reflects only three courses involving graphic or computer design subjects. On appeal, the petitioner submits two evaluations from artists asserting that graphic design and illustration programs are comparable. 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)).

While the artists appear to have expertise in the arts, the record lacks evidence that they have expertise evaluating academic credentials. Without a credible and well-supported evaluation from a credentials evaluator, we cannot conclude that the beneficiary has the required degree in graphic design. We note that any future petition based on the ETA Form 9089 supporting this petition, including one filed under a lesser classification, would need to resolve this issue.

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.