

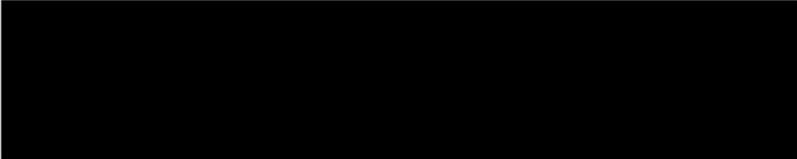
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FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: JUL 07 2008
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IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:
[Redacted]

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 The decision of the director will be withdrawn, the appeal will be sustained, and the petition will be approved.

The petitioner is a non-profit entity. It seeks to employ the beneficiary permanently in the United States as a training/supervising child and adult psychoanalyst 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 a reading of the alien employment certification as a whole demonstrates that the job does require a member of the professions holding an advanced degree. For the reasons discussed below, we concur with counsel.

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 regulation at 8 C.F.R. § 204.5(k)(4)(i) provides that the job offer portion of the individual alien employment certification "must demonstrate that the job requires a professional holding an advanced degree or the equivalent."

The beneficiary completed the medical program at the University of Buenos Aires for which he received the title "Doctor of Medicine." This degree has been evaluated as a "first professional degree in medicine." Two years later the Argentine Ministry of Social Welfare certified the beneficiary in Psychiatry. The beneficiary is a full member of the International Psychoanalytical Association (IPA) by virtue of his membership in the Buenos Aires Psychoanalytic Association, which qualifies him to practice psychoanalysis. The beneficiary has more than five years of progressive experience. The beneficiary's occupation falls within the pertinent regulatory definition of a profession. Thus, the beneficiary qualifies as a member of the professions holding an advanced degree as defined at 8 C.F.R. § 204.5(k)(2). The only issue in contention is whether the job offered requires a member of the professions holding an advanced degree.

The key to determining the job qualifications is found on ETA Form 9089, Part H. This section of the application for alien employment 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. CIS must look to the job offer portion of the alien employment certification to determine the required qualifications for the position. 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 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); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In this matter, Part H, Line 4, of the alien employment certification reflects that a bachelor's degree in psychology is the minimum level of education required. Line 8 reflects that no combination of education and experience is acceptable in the alternative. Line 9 reflects that a foreign educational equivalent is acceptable.

The exact language of Lines 6 through 14 and the petitioner's responses are relevant to our evaluation and are repeated below.

Line 6: Is experience *in the job offered* required for the job? "Yes."
Line 6-A: If Yes, number of months experience required: "48."
Line 10: Is experience in an alternate occupation *acceptable*? "No."
Line 14: Specific skills or other requirements: "Experience in the British Object Relations school of psychoanalysis; *credentials acknowledged by the International Psychoanalytic Association*; valid Washington State license to practice psychotherapy."

(Emphasis added.) The director concluded that since only 48 months of experience were required for the job offered, the job does not require a bachelor's degree plus five years of experience.

On appeal, counsel asserts that the job requires at least four years in the job offered. Thus, the petitioner answered "48" when asked the number of months of experience in the job offered was required. As none of this experience could be in an alternate occupation, the petitioner had to answer "No" to question 10. According to counsel, however, by requiring IPA certification, the petitioner also required at least five years of post-baccalaureate experience.

First, it must be noted that the Form ETA-9089 was developed solely to allow the Department of Labor to determine and certify to the Department of Homeland Security and to the Department of State that there are no able, willing, qualified and available U.S. workers to fill a specific position, and that the employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers. Section 212(a)(5)(A) of the Act. DOL certification of the form does not establish that the alien or the position meet the requirements of any preference classification. *See* May 25, 2007 Declaration of William L. Carlson, PhD, Administrator, OFLC, ETA, U.S. Department of Labor, (copy incorporated into the record of proceeding). In contrast, CIS is charged with determining whether the proffered employment and the alien's education and

employment history meet the requirements of the requested preference classification. *See* section 103(a)(1) of the Act (charging the Secretary of Homeland Security with the administration and enforcement of laws in the Act and all other laws relating to the immigration and naturalization of aliens, except insofar as those laws relate to the powers, functions and duties of the President, the Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers); *see also* section 204(b) of the Act (“[a]fter investigation of the facts in each case, and after consultation with the Secretary of Labor...[the Secretary of Homeland Security] shall, if he determines that the facts stated in the petition are true and that the alien in behalf of whom the petition is made...is eligible for preference under subsection (a) or (b) of section 1153 of this title, approve the petition”). *See also* 8 C.F.R. § 204.5(k)(4). Accordingly, given that it is designed solely for DOL’s purposes, the Form ETA 9089 does not necessarily request, elicit, or present information that is useful to CIS in its administration of the Act.¹ In fact, CIS review of the Form ETA 9089 and has led to understandable confusion during adjudication of relating immigrant petitions.

In this instance, the confusion arises from the absence on the ETA Form 9089 of a general question as to whether any experience is required before breaking down the question as to whether that experience must be in the job offered or can be in an alternate occupation. The petitioner’s responses must be afforded the most reasonable interpretation.

The petitioner provided a copy of the IPA’s Minimum Requirements for Acquiring and Maintaining the Function of Training Analyst, the job in which the petitioner requires at least four years of experience. This document indicates that in order to be assessed as a training analyst, the individual must have been a member of the IPA, “implying a minimum of five years of experience of unsupervised psychoanalytical treatments.” Thus, by requiring four years of experience as a training analyst, the petitioner indirectly but effectively required five years of experience as a psychoanalyst, for a total of nine years of experience following a first professional degree.

In light of the above, we are persuaded that the job requires an advanced degree professional.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has met that burden.

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

¹ CIS has repeatedly met with DOL to discuss how CIS uses the Form ETA 9089 and to suggest changes to the form.