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FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: **MAY 06 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 appeal will be sustained; the petition will be approved.

The petitioner is a software developer. It seeks to employ the beneficiary permanently in the United States as a computer analyst, which the Department of Labor (DOL) defined as a software engineer, 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, a Form ETA 750 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 that the director should have only considered the job's primary requirements, and not the alternative requirements. While counsel is not persuasive, 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.)

We note that the beneficiary in this matter has a Master's Degree in Executive Finance from Baruch College, City University of New York. Thus, he holds an advanced degree. At issue is whether the job requires a member of the professions and whether the beneficiary is a member of that profession.

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

Block 14:

Education: Master's Degree in Computer Science or Computer Engineering\*

Experience: 6 months in the job offered or as a programmer analyst or software consultant.

Block 15: \*Master's degree in any field plus one year vocational training as a Visual Software Developer also acceptable.

On appeal, counsel asserts that the primary requirements for the position, a Master's degree in Computer Science or Engineering, meets the regulatory definition of a job that requires a member of the professions holding an advanced degree. Counsel is not persuasive. Clearly a job that required a baccalaureate or an associate's degree plus experience in the alternative would have to be considered a position that, ultimately, did not require a baccalaureate. Nevertheless, for the reasons discussed below, we are persuaded that the alternative job requirements in this matter are not disqualifying.

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.

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 Statistic’s website at [www.bls.gov](http://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 job requires a member of the professions or whether the beneficiary is a member of that profession, 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 (9<sup>th</sup> 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 (9<sup>th</sup> Cir. 1983). 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 associated with the occupation certified by DOL. We note that being a member of the professions does not entitle the alien to classification as a professional if he does not seek to continue working in that profession. See *Matter of Shah*, 17 I&N Dec. 244, 246-47 (Regl. Commr. 1977).

The job certified by DOL in this matter requires a Master's degree and the director did not reference a source of information suggesting that a minimum of a baccalaureate 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, the OOH 112 (2006-07 ed.) states:

Most employers prefer to hire persons who have at least a bachelor's degree and broad knowledge of, and experience with, a variety of computer systems and technologies. The usual degree concentration for applications software engineers is computer science or software engineering; for systems software engineers, it is computer science or computer information systems. Graduate degrees are preferred for some of the more complex jobs.

\* \* \*

For systems software engineering jobs that require workers who have a college degree, a bachelor's degree in computer science or computer information systems is typical. For systems engineering jobs that place less emphasis on workers having a computer related degree, computer training programs leading to certification are offered by systems software vendors.

This language reveals that while a bachelor's degree in computer science or computer information systems is "typical," a degree in that field is not required for entry into the profession. Ultimately, the typical requirement for the proffered position is "at least a bachelor's degree," although a specific field of study is not always necessary.<sup>1</sup> In light of the above, we are satisfied that the position certified by DOL is a profession.

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.

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<sup>1</sup> The O\*NET data for software engineers, available at <http://online.onetcenter.org/link/summary/15-1031.00>, reveals that 85 percent of software engineers hold baccalaureate degrees.