



U.S. Citizenship
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FILE: [Redacted]
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Office: NEBRASKA SERVICE CENTER

Date: MAY 15 2008

IN RE: Petitioner:
Beneficiary:

[Redacted]

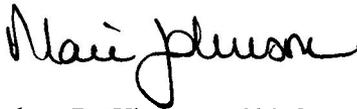
PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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 dismissed.

The petitioner is a construction developer. It seeks to employ the beneficiary permanently in the United States as a construction project operations manager 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 submits a statement asserting that the director erred and should have issued a request for additional evidence prior to denying the petition. The regulation at 8 C.F.R. § 103.2(b)(8)(i) provides that if the record evidence “establishes ineligibility, the application or petition will be denied on that basis.” As the director concluded that the ETA Form 9089 did not require a member of the professions holding an advanced degree and, thus, could not support a petition filed in that classification, the director was justified in denying the petition based on that ground of ineligibility. Moreover, counsel has not explained what evidence would have been submitted in response to such a request and submits no new evidence on appeal. Counsel suggests that the petition should now be adjudicated pursuant to section 203(b)(3) of the Act. The petitioner requested adjudication of the petition under section 203(b)(2) of the Act. There is no provision that would allow the AAO to review the petition and appellate submission under the statutory and regulatory provisions of a different classification. For the reasons discussed below, we find that the director’s conclusion is supported by the plain language of the regulation at 8 C.F.R. § 204.5(k)(4), which is binding on us.

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 bachelor's degree is the minimum level of education required. Line 6 reflects that 12 months of experience are required. Line 8 reflects that a combination of education or experience is acceptable in the alternative. Lines 8-A and 8-C reflect that the acceptable alternative is a master's degree plus one year of experience. Line 9 reflects that a foreign educational equivalent is acceptable.

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*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). CIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *See generally Madany*, 696 F.2d at 1015. 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." *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 [labor certification application form]." *Id.* at 834 (emphasis added). 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.

On appeal, counsel asserts that the director erred "in finding this position is not for a professional with an advanced degree and/or in not finding this is a professional position." The director did not conclude that the position is not a professional position. Rather, the director concluded that the job did not require a member of the professions holding an advanced degree.

The regulation at 8 C.F.R. § 204.5(k)(2) defines an advanced degree as follows:

[A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate 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 degree or a foreign equivalent degree.

(Emphasis added.) As the job requires only a bachelor's degree plus *one* year of experience, we must concur with the director's decision that the job does not require a member of the professions holding an advanced degree as required under 8 C.F.R. § 204.5(k)(4).

On appeal, counsel also asserts that the director erred in not considering whether the beneficiary was an alien of exceptional ability pursuant to section 203(b)(2) of the Act. We note that the cover letter submitted with the petition referenced a nonimmigrant petition and asserted only that the beneficiary was a member of the professions. Counsel did not assert previously that the petition seeks to classify the beneficiary as an alien of exceptional ability. We note that The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. Counsel did not initially indicate which of the criteria the beneficiary is alleged to meet. In fact, even on appeal, counsel does not explain how the beneficiary qualifies for classification as an alien of exceptional ability. The six criteria set forth at 8 C.F.R. § 204.5(k)(3)(ii) are as follows:

- (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability
- (B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought
- (C) A license to practice the profession or certification for a particular profession or occupation
- (D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability
- (E) Evidence of membership in professional associations
- (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

The only criterion for which the petitioner submitted relevant evidence is the first criterion regarding a degree, diploma, certificate or similar award from a college, university, school, or other institution

of learning relating to the area of exceptional ability. As stated above, an alien must meet at least three criteria to be eligible for classification as an alien of exceptional ability.

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.