



U.S. Citizenship
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FILE:

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Office: NEBRASKA SERVICE CENTER

Date: MAY 30 2008

IN RE:

Petitioner:

Beneficiary:



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 certification. The director's decision will be affirmed.

The petitioner is a software developer. It seeks to employ the beneficiary permanently in the United States as an information technology operations director 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 did not satisfy the minimum level of education stated on the alien employment certification. Specifically, the director determined that the beneficiary did not possess a Master's degree from a U.S. institution that is regionally accredited.

The director advised the petitioner that it had 30 days in which to submit a brief or written statement to this office. The director's decision was dated November 28, 2007. As of this date, more than 60 days later, this office has received nothing further. Thus, this decision is based on the record before the director. For the reasons discussed below, we affirm the director's decision.

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 a foreign equivalent degree to a bachelor of science in computer science from a regionally accredited institution in the United States plus five years of progressive experience. Thus, as acknowledged by the director, the beneficiary could qualify as an advanced degree professional as defined at 8 C.F.R. § 204.5(k)(2). At issue is whether the beneficiary meets the job requirements of the proffered job as set forth on the alien employment certification. In addition to his foreign baccalaureate, the beneficiary has a "Master of Science" diploma from Columbus University. As noted by the director, Columbus University is not regionally accredited. Rather, it is accredited by the World Association of Universities and Colleges (WAUC), which is not recognized by the U.S. Department of Education (ED) as an accrediting body.

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; 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).

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 Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(5), 8 U.S.C. § 1182(a)(5). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). See generally *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

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 alien employment certification.

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.

In this matter, Part H, line 4, of the alien employment certification reflects that a Master of Science in Computer Science is the minimum level of education required. We note that Line 4 includes “other” as an option, but that the petitioner checked “Master’s” instead. Line 6 reflects that one year of experience is required. 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.

We note that the regulation at 20 C.F.R. § 656.3 (definition of professional) states that if the employer is willing to accept work experience in lieu of a baccalaureate or higher degree, such work experience must be attainable in the U.S. labor market *and must be stated on the application form*. Thus, there is no question that the alien employment certification in this matter requires a U.S. Master’s degree.

The word “Master’s” is not open to broad interpretation. It is a specific graduate degree awarded by a university. Moreover, we are not persuaded that any diploma or certificate labeled a “Master of Science” degree must be presumed to be a Master’s degree as that term is normally understood. The United States has no centralized authority exercising control over postsecondary educational institutions. *See* www.ed.gov/print/admins/finaid/accred/accreditation.html. Rather, to ensure a basic level of quality, private educational associations of regional or national scope have adopted criteria reflecting the qualities of a sound educational program and have developed procedures for evaluation institutions or programs to determine whether or not they are operating at basic levels of quality. *Id.* ED recognizes certain accrediting bodies for the accreditation of institutions of higher (postsecondary) education. *Id.* Thus, it is clear that accreditation from an ED recognized body ensures a “basic” level of quality. Conversely, it necessarily follows that there is no assurance that an institution that is not accredited by an ED recognized body provides that “basic” level of quality.

In light of the above, a “Master of Science” diploma from an unaccredited institution cannot be presumed to be an actual Master’s degree. *See generally Tang v. INS*, 298 F. Supp. 413, 419 (C.D.

Cal. 1969). We emphasize that the petitioner was advised of the director's concerns in the notice of certification and, despite being advised of his right to submit a brief or statement in response, has not challenged the director's conclusion or provided evidence that Master's degrees from Columbus University are routinely accepted as equivalent to Master's degrees from regionally accredited institutions.

The beneficiary does not have a Master of Science in Computer Science from a regionally accredited institution in the United States and, thus, does not meet the job requirements on the alien employment certification. For this reason, 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 sustained that burden. Accordingly, the decision of the director denying the petition will be affirmed.

ORDER: The petition is denied.