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U.S. Department of Homeland Security  
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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

Bc

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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: JUL 30 2007  
SRC-06-026-50301

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3)  
of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 preference visa petition was approved by the Director, Texas Service Center, and was certified to the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn. The petition will be denied.

The petitioner is a medical and laboratory equipment sales and service company. It seeks to employ the beneficiary permanently in the United States as an Instrumental Manager Analyst Consultant. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Pursuant to Department of Labor regulations which took effect on March 29, 2005, the ETA Form 9089 replaces the Form ETA 750 Application for Alien Employment Certification which was previously in use. *See* Employment and Training Administration, U.S. Department of Labor, *20 CFR Parts 655 and 656, Labor Certification for the Permanent Employment of Aliens in the United States; Implementation; Final Rule*, 69 Fed. Reg. 77325, 77327 (Dec. 27, 2004).

Concerning the instant petition, the director determined that the evidence established that the beneficiary satisfied the requirements of the Form ETA 9089 as a professional, and approved the petition. The director then certified the petition to the AAO.

Certifications by regional service center directors may be made to the AAO “when a case involves an unusually complex or novel issue of law or fact.” 8 C.F.R. § 103.4(a)(1).

The regulation at 8 C.F.R. § 103.4(a)(4) states as follows: “*Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision.” The following subsection of that same regulation states as follows: “*Certification to [AAO].* A case described in paragraph (a)(4) of this section may be certified to the [AAO].” 8 C.F.R. § 103.4(a)(5).

The AAO’s jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO’s jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).

The regulation at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003) states in pertinent part:

(iii) Appellate Authorities. In addition, the Associate Commissioner for Examinations exercises appellate jurisdiction over decisions on;

(B) Petitions for immigrant visa classification based on employment or as a special immigrant or entrepreneur under Secs. 204.5 and 204.6 of this chapter except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act;

Pursuant to the delegation cited above, the AAO exercises the appellate jurisdiction formerly exercised by the Associate Commissioner for Examinations.

In the instant case, the petition was approved by the director, therefore the decision does not fall within the exception clause in subparagraph (B) in the regulation quoted above, which pertains only to a denial based upon a lack of a certification by the Secretary of Labor. The approval decision therefore was within the appellate jurisdiction of the AAO. Therefore, the certification of the denial decision is authorized by the regulation at 8 C.F.R. § 103.4(a)(5).

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who, at the time of petitioning for classification under this paragraph, are professionals.

A labor certification is an integral part of this petition, but the issuance of an ETA Form 9089 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date is the date the Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is June 21, 2005. The ETA Form 9089 was certified by the Department of Labor on August 16, 2005.

Under Department of Labor regulations which took effect on March 28, 2005, when the ETA Form 9089 is submitted by mail it must be signed by the employer and the alien prior to submission. When the ETA Form 9089 is submitted electronically, it must be signed by the beneficiary and by the petitioner immediately following the certification by the Department of Labor and the transmittal of the approved form to the petitioner. 20 CFR § 656.17(a)(1). In the instant case, the signatures of the employer (the petitioner) and the alien (the beneficiary) on the ETA Form 9089 are dated after the August 16, 2005 date of the certification by the Department of Labor, thereby indicating that the ETA Form 9089 was submitted electronically.

On the ETA Form 9089, signed by the beneficiary on October 22, 2005, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on November 2, 2005. On the petition, the petitioner claimed to have been established on September 2, 1997, to currently have thirty employees, to have a gross annual income of "Over \$7,000,000.00", and to have a net annual income of "Over \$2,000,000.00." (I-140 petition, Part 5). With the petition, the petitioner submitted supporting evidence.

No request for additional evidence was issued by the director.

In a decision dated November 23, 2005 the director determined that the evidence was sufficient to establish that the beneficiary had the qualifications required by the ETA Form 9089 as of the priority date and that the beneficiary qualified as a professional. The director accordingly approved the petition, but certified the decision to the AAO for review.

On certification, counsel submits a brief and additional evidence. Counsel states on certification that the ETA Form 9089 requires a bachelor's degree in the field of business administration, but also states that a "U.S. Equivalent" alternate field of study is acceptable. (Brief, December 19, 2005, at 3).

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien’s experience or training will be considered.

To determine whether a beneficiary is eligible for an employment-based immigrant visa as set forth above, Citizenship and Immigration Services (CIS) must examine whether the alien’s credentials meet the requirements set forth in the labor certification. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). The Application for Permanent Employment Certification, ETA Form 9089, section H, sets forth the minimum education, training and experience that an applicant must have for the position of Instrumental Manager Analyst Consultant. In the ETA Form 9089 submitted with the instant petition, section H describes the requirements of the offered position as follows:

- 4. Education: minimum level required.  
 None     High School     Associate’s     Bachelor’s     Master’s     Doctorate     Other
- 4-A. If Other, specify the education required: .....[blank]
- 4-B. Major field of study: ..... **Business Administration**
- 5. Is training required? .....  Yes     No
- 5-A. If yes, number of months of training required: .....[blank]
- 5-B. Indicate the field of training: .....[blank]
- 6. Is experience in the job offered required for the job? .....  Yes     No
- 6-A. If yes, number of months of experience required: ..... **12**
- 7. Is there an alternate field of study that is acceptable? .....  Yes     No
- 7-A. If Yes, specify the major field of study: ..... **Related Field**
- 8. Is there an alternate combination of education and experience that is acceptable? .....  Yes     No
- 8-A. If yes, specify the alternate level of education required.  
 None     High School     Associate’s     Bachelor’s     Master’s     Doctorate  
 Other
- 8-B. If Other is indicated in question 8-A, indicate the alternate level of education required: ..... **Credential Evaluations or U.S. Equivalent**
- 8-C. If applicable, indicate the number of years experience acceptable in question 8: ..... **12<sup>1</sup>**
- 9. Is a foreign educational equivalent acceptable? .....  Yes     No

<sup>1</sup> The current DOL instructions to ETA Form 9089 state that this question is to be answered in “months.” The face of the form states that this question is to be answered in “years.” It is unclear whether 8-C annotates 8-B or whether the petitioner was setting forth alternative requirements that included a bachelor’s degree and 12 years of experience. Clarifying that requirement does not impact the ultimate outcome in this decision.

- 10. Is experience in an alternate occupation acceptable? .....  Yes  No
- 10-A. If Yes, number of months experience in alternate occupation required .....12
- 10-B Identify the job title of the acceptable alternate occupation: **Clinical Laboratory Equipment Technical Services**

The beneficiary states his qualifications on ETA Form 9089, section J. In blocks 11 through 23 of that section, the alien states his education, training and experience. In the ETA Form 9089 submitted with the instant petition, section J states in pertinent part as follows:

- 11. Education: highest level achieved relevant to the requested occupation.  
None High School Associate's Bachelor's Master's Doctorate  Other
- 11-A. If Other indicated in question 11, specify ..... **U.S. Equivalent of a Bachelor's Degree in Business Administration**
- 12 Specify major field(s) of study: ..... **Business Administration**
- 13 Year relevant education completed: ..... **2003**
- 14 Institution where relevant education specified in question 11 was received: ..... **Foundation for International Services**
- 15 Address 1 of conferring institution: ..... **21540 – 30 Drive, S.E. Suite 320**
- Address 2: ..... [blank]
- 16 City: **Brothell** State/Province: **WA** Country: **United States of America** Postal Code: **98021-7008**
- 17. Did the alien complete the training required for the requested job opportunity as indicated in question H.5? .....  Yes  No  NA
- 18. Does the alien have the experience as required for the requested job opportunity as indicated in question H.6? .....  Yes  No  NA
- 19. Does the alien possess the alternate combination of education and experience as indicated in question H.8? .....  Yes  No  NA
- 20. Does the alien have the experience in an alternate occupation specified in question H.10? .....  Yes  No  NA
- 21. Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested? .....  Yes  No  NA
- 22. Did the employer pay for any of the alien's education or training necessary to satisfy any of the employer's job requirements for this position? .....  Yes  No
- 23. Is the alien currently employed by the petitioning employer? .....  Yes  No

The beneficiary states his work experience on ETA Form 9089, section K. He states his experience in pertinent part that he worked for [redacted] in Coral Springs, Florida as a full time instrumental manager analyst from January 15, 2001 to May 15, 2003, and for [redacted]

in Caracas, Venezuela as a full time sales and technical support from January 10, 1991 to December 15, 1999. The beneficiary did not provide any further information pertinent to his work experience on that form.

The record contains a copy of an evaluation report on the beneficiary's credentials by the Foundation for International Services, Inc. (FIS) dated March 14, 2005. That report finds that the beneficiary was awarded a bachelor of science diploma on July 20, 1998 by the Bolivarian Institute of Integral Education, Venezuela, and it finds the beneficiary's diploma to be equivalent to graduation from high school in the United States.

The evaluation report also finds that the beneficiary attended the [REDACTED] Catholic University in Venezuela and studied accounting and business administration from 1992 to 1993 and from 1996 to 1997. The reports finds those studies to be equivalent to approximately two years of university-level credit from a regionally accredited college or university in the United States.

The evaluation report finds that the beneficiary's relevant work experience consists of a total of 11 ¼ years of work in two positions, first with one company as an Administrative Services and Technical Support from January of 1991 to December of 1999, and then with another company as an Instrumental Manager Analyst Consultant from January of 2001 to May of 2003.

The evaluation report finds that each three years of the beneficiary's work experience are equivalent to one year of university level credit. Using that formula, the report finds that the beneficiary has an educational background which is the equivalent of an individual with a bachelor's degree in business administration from a regionally accredited college or university in the United States.

The record contains documentary evidence supporting each of the findings of the evaluation report pertaining to the beneficiary's education and work experience.

CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept that evidence, or may give less weight to it. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

The regulation at 8 C.F.R. § 204.5(1)(2) states in pertinent part

*Professional* means a qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.

*Skilled worker* means an alien who is capable, at the time of petitioning for this classification, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States. Relevant post-secondary education may be considered as training for the purposes of this provision.

Concerning the evidence needed to support classification in the above preference categories, the regulation at 8 C.F.R. § 204.5(1)(3)(ii) states in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

(C) *Professionals.* If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation.

In the definition of “professional,” the regulation at 8 C.F.R. § 204.5(1)(2) uses a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language sets forth the requirement that a beneficiary must have one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

The formula employed by FIS in substituting three years of specialized work experience for one year of university level studies is one which is found in the regulations governing H-1B nonimmigrant visas petitions. See 8 C.F.R. 214.2(h)(4)(iii)(D)(5). However, the nonimmigrant regulations governing H-1B visa petitions are not applicable to the instant immigrant petition.<sup>2</sup>

Additionally, a bachelor degree is generally found to require four years of education. *Matter of shah*, 17 I&N Dec. 244, 245 (Comm. 1977).

With regard to the preference category applicable to the instant petition, the instant petition was submitted with a mark in check box letter “e,” for “A skilled worker (requiring at least two years of specialized training or experience) or professional.” (See Form I-140). The Form I-140, Part 2, Petition Type, does not distinguish between skilled workers and professionals, for a single check box, letter “e,” applies both to skilled workers and

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<sup>2</sup> The AAO notes that the record of proceeding would not support an H-1B equivalency determination because there is no documentation complying with the regulatory requirements of 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(5)(i) through (v). The AAO is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F. Supp.2d 800, 803 (E.D. La. 2000), *affd*, 248 F.3rd 1139 (5<sup>th</sup> Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

to professionals. (See Form I-140 Immigrant Petition for Alien Worker, Part 2, Petition Type). Nonetheless, in a letter dated October 17, 2005 accompanying the instant petition, the petitioner's president states, "This petition is filed for a professional, at a minimum, possessing a bachelor's degree or a foreign degree equivalent to a U.S. bachelor's Degree. (Letter from petitioner's president, October 17, 2005, at 3). Moreover, counsel makes clear in his brief on appeal that the petitioner is seeking to classify the position as one for a professional, and not as a position for a skilled worker.<sup>3</sup> For the foregoing reasons, it is not necessary to consider whether the instant petition would satisfy the requirements for a position to be filled by a skilled worker.

In her decision, the director found that the evidence was sufficient to establish that the beneficiary had the qualifications required by the ETA Form 9089 as of the priority date and that the beneficiary qualified as a professional.

As discussed above, the evidence fails to establish that the beneficiary qualifies as a professional. The director's finding that the beneficiary qualifies as a professional was therefore incorrect. The evidence fails to establish that the beneficiary has a United States bachelor's degree as required by ETA Form 9089, section H,

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<sup>3</sup> Additionally, the proffered position requires a bachelor's degree and a year of experience and not just two years of experience. Because of that requirement, the proffered position is for a professional. DOL assigned the occupational code of 13-1111 for management analysts to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at <http://online.onetcenter.org/link/summary/13-111.00#JobZone> (accessed December 12, 2006) and its extensive description of the position and requirements for the position most analogous to the petitioner's proffered position, the position falls within Job Zone Four requiring "considerable preparation" for the occupation type closest to the proffered position. According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do not." See *id.* (accessed December 12, 2006). Additionally, DOL states the following concerning the training and overall experience required for these occupations:

A minimum of two to four years of work-related skill, knowledge, or experience is needed for these occupations. For example, an accountant must complete four years of college and work for several years in accounting to be considered qualified. Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.

*See id.*

The proffered position may be properly analyzed as professional since the position requires a bachelor's degree, which is required by 8 C.F.R. § 204.5(l)(3)(ii)(C) and DOL's classification and assignment of educational and experiential requirements for the occupation. The professional category is the most appropriate category for the proffered position based on its educational requirement.

items 4 to 4-A, or a foreign equivalent degree.<sup>4</sup> The director's decision to approve the petition was therefore incorrect.

In addition, the petitioner provided inconsistent information regarding the beneficiary's employment history. The record contains an approval notice on the petitioner's H-1B petition on behalf of the beneficiary. The approval granted the beneficiary a H-1B temporary nonimmigrant status with the petitioner from June 1, 2003 to June 1, 2006. The petitioner claimed in its October 17, 2005 letter that it was currently employing the beneficiary under an H-1B status. However, the petitioner did not reveal the beneficiary's current employment with the petitioner on ETA Form 9089 filed on June 21, 2005. The submitted 2003 W-2 form and 2005 paystubs for the beneficiary were issued by companies other than the petitioner. The record does not contain any independent objective evidence to resolve these inconsistencies. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

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. It may be noted that a denial of an I-140 petition is without prejudice to a new I-140 and labor certification filing. However, any new petition submitted by the petitioner would have to be supported by evidence clarifying the intended work location of the beneficiary. Moreover any new petition would have to be supported by evidence sufficient to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, including the years since the record closed in the instant petition.

**ORDER:** The decision of the director to approve the petition is withdrawn. The petition is denied.

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<sup>4</sup> In fact, the director twice mentions that the beneficiary holds a 3-year degree and the evaluation from FIS also clearly states that the beneficiary has only 2 years of college education.