U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

B10

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: NOV 09 2004

IN RE: Petitioner: [redacted]
Beneficiary:

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:

[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.

for Robert P. Wiemann, Director
Administrative Appeals Office

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a pharmaceutical contract research firm. It seeks to employ the beneficiary permanently in the United States as a group leader. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

Eligibility in this matter turns on whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date. The date that the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor constitutes the priority date. *See* 8 C.F.R. § 204.5(d). The petition's priority date in this instance is August 27, 2001. The beneficiary's salary as stated on the labor certification is $62,990 per year.

The petitioner submitted the instant Immigrant Petition for Alien Worker (Form I-140) on June 12, 2003. [1] The director did not deem the original submissions, described below, sufficient evidence of the work experience set forth in Form ETA 750, Part A, blocks 14 and 15. In a request for evidence (RFE) dated October 1, 2003, the director required additional evidence to establish six (6) years of experience in the job offered or in the related occupations of chemist, research scientist, research assistant, or similar. The RFE emphatically specified proof in the form of letters from current or former employers including the description of the beneficiary's experience, exact dates of employment and specific duties. Regulations prescribe the form of experience letters. *See* 8 C.F.R. § 204.5(g)(1). The RFE further exacted evidence that the beneficiary fulfilled special requirements of block 15 of Part A of the Form ETA 750. [2]

Pertinent to the RFE, counsel referenced the letter of the petitioner's Human Relations Manager, dated April 2, 2003 (Ballweg letter), confirming "that [the beneficiary] has been employed by [the] petitioner since July 2000, first as a Research and Development Scientist until February 2001, and as a Group Leader since February 2001." Also, the record already contained the beneficiary's curriculum vitae. Two (2) recommendation letters, from McClain and Hari, stated PhD. program research goals to which the beneficiary contributed. [3]

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[1] A previous petition of August 1, 2002 for the beneficiary (the exceptional ability I-140) related to members of the professions holding advance degrees or aliens of exceptional ability under provisions of Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2). The director denied the exceptional ability I-140 on March 26, 2003, and the petitioner did not appeal. It contains several exhibits that the petitioner and director reference for the instant petition.

[2] These specified that the beneficiary "Must be proficient w/ sample preparation & instrumentation & understand GLP/GMP requirements."

[3] Letters regarding extraordinary ability were dated January 17, 1997, from W. M. McClain, Professor of Chemistry at Wayne State University, summarizing the beneficiary's PhD. activities (McClain recommendation) and dated December 8, 1997, from V. Hari, Associate Professor of biological sciences at Wayne State University (Hari recommendation) as to the extraordinary ability I-140.

In response to the RFE, counsel included a brief (RFE brief). It referenced "the as "the Service's own internal guidance" and implied that its advice was persuasive. Its title was "Educational Requirements for Employment-Based Second Preference (EB-2) Immigrants" (the EB-2 memorandum). The EB-2 memorandum scrutinized unrelated provisions for professionals with advanced degrees or aliens of outstanding ability. *See* § 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2).

The response to the RFE offered a new assessment of the beneficiary's education from Morningside Evaluations and Consulting (the Morningside Evaluation). It concluded that the beneficiary had attained the equivalent of a Bachelor of Science in chemistry. Counsel deduced that, after the completion of a PhD., the beneficiary "must possess the equivalent of at least *five* years of *progressive* experience in the specialty." Additionally, counsel concluded that the Hari recommendation attested to seven months of work experience. Counsel postulated that the Ballweg letter stated a period of employment from July 2000 to the priority date. Counsel reasoned that the total, six (6) years and eight (8) months exceeded the requirement of the Form ETA 750, Part A, block 14.

The director considered that the Ballweg letter competently documented about one (1) year and (1) month, less than the six (6) years of experience before the priority date that the petitioner required in Form ETA 750. The director, however, determined that McClain recommendation provided no evidence of qualifying work experience and that neither the McClain nor Hari recommendation letters described duties of the beneficiary, as specified in the RFE. Since counsel had provided no copy of the EB-2 memorandum, the director declined to determine its relevance. The director dismissed, as speculation, counsel's hypothesis that five (5) years of PhD. study necessarily equals five (5) years of experience. The director discounted, as self-serving, statements of experience in the curriculum vitae. The director considered the provision in Form ETA 750, Part A, block 15, stating that "Item 14 requirements may be met by equivalent based on education and experience," but concluded that the petitioner must meet the requirement for six (6) years of experience independently of education and denied the petition.

Counsel asserts, on appeal, that:

> At [the priority date], [the beneficiary] had:
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> . . .
>
> 3. A Ph.D. in Physical Chemistry and Biochemistry from Wayne State University, in Detroit Michigan;
> 4. More than two-and-a-half years full-time equivalent science work experience between his MS degree and the commencement of his PH.D. work at Wayne State University, as a Chemistry Lecturer, Research Assistant, and Graduate Assistant at three colleges and universities; *and*
> 5. Over five-and-a-half years full-time equivalent science work experience at the Chemistry Department of Wayne State University, where he held a variety of teaching and research positions.

Counsel contends that post-graduate "work" on these projects, as described in the McClain and Hari recommendations, must imply "full-time equivalent science work experience," and, thus, qualifying experience of eight (8) years. Counsel, also, states that, generally, graduate students work on projects in their academic departments and receive compensation for their activity.

The evidence must show the component of experience in the eight and one-half years of Ph.D. study. Provisions of 20 C.F.R. § 656.21(a)(3)(iii) specify the proof for the experience set forth in the Form ETA-750, viz.:

> (A) Documentation of the alien's paid experience in the form of statements from past or present employers setting forth the dates (month and year) employment started and ended, hours of work per day, number of days worked per week, place where the alien worked, detailed statement of duties performed on the job, equipment and appliances used, and the amount of wages paid per week or month. The total paid experience must be equal to one full year's employment on a full-time basis. For example, two year's experience working half-days is the equivalent of one year's full time experience. . . .

Under § 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i):

> *Employment* means permanent, full-time work by an employee for an employer other than oneself.
>
> *Employer* means a person, association firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker. . . .

The beneficiary must receive wages for stated hours of work, and the RFE requested evidence that might show the experience claimed for requirements of the Form ETA 750. The petitioner did not present evidence of wages or of full-time employment of the beneficiary. Counsel emphasizes that graduate students receive financial compensation, but the evidence does not reveal the duration or the compensation of the beneficiary's work.

Employment is defined as permanent, full-time work. 20 C.F.R. § 656.3, *Employment*. Evidence must relate to qualifying experience. *See* 8 C.F.R. § 204.5(g)(1).

Counsel, however, asserts that CIS must find that a Ph.D. equals five (5) years of experience on the controlling authority of the EB-2 memorandum and on the evidence of the Morningside evaluation, *supra*. The instant petition, however, is one for a third preference classification, set forth at the outset. As noted above, the EB-2 memorandum construes unrelated provisions for professionals with advanced degrees or aliens of outstanding ability. *See* § 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2). Counsel's construction of this statute is not persuasive relative to this petition. [4]

The effect of the EB-2 memorandum must rest on the principle that letters and correspondence issued by offices of CIS are not binding on the AAO. Memoranda in response to specific queries, such as the EB-2 memorandum is, do not constitute official CIS policy and will not be considered as such in the adjudication of petitions or applications. Although such memoranda may be useful as an aid in interpreting the law, they are not binding on any CIS officer, as they merely indicate the writer's analysis of an issue. *See* Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letter Drafted by the Office of Adjudications* (December 7, 2000).

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[4] The EB-2 memorandum considers the substitution of experience for education. To the contrary, counsel's argument on this petition seeks to substitute education for experience. This unexplained difference further diminishes the authority of the EB-2 memorandum for this petition.

As noted above, no applicable authority supports the substitution of education for experience or the equation of "full-time equivalent science work" as experience. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The McClain and Hari recommendations do not state periods of full-time employment and wages paid to the beneficiary. The AAO cannot surmise them from the record.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 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. *See* 8 C.F.R. § 204.5(d). *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The Form ETA 750 indicated that the position of group leader required six (6) years of experience in the job offered or related occupations. The petitioner has not established that the beneficiary had six (6) years of experience, as defined in the law and regulations. Therefore, the petitioner has not overcome this portion of the director's decision.

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.