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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JAN 28 2008

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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:

SELF-REPRESENTED

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.

Marie Pleuss

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 provides portfolio management consulting services. It seeks to employ the beneficiary permanently in the United States as a market research analyst 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 job did not require an advanced degree professional and that the beneficiary did not possess the experience required for the job.

On appeal, the petitioner erroneously asserts that the petition was denied solely because the beneficiary did not possess the required one year of experience, although the petitioner notes that it agreed to a lesser classification than the one originally requested. For the reasons discussed below, while the director should have considered the petition under a lesser classification, we uphold the director's conclusion that the petitioner failed to submit the initial required evidence of the beneficiary's experience as set forth at 8 C.F.R. § 204.5(g)(1).

In pertinent part, section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), 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 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 in marketing is the minimum level of education required. Line 6 indicates that one year of experience in the job offered 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 acceptable. Finally, line 10 reflects that one year of experience in an alternate field is also acceptable.

When evaluating the job requirements, Citizenship and Immigration Services (CIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983). 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 labor certification.

On February 16, 2006, the director issued a request for additional evidence advising that, in order to support a petition filed pursuant to section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), the job must require an advanced degree or a bachelor's degree plus at least five years of progressive experience. The director inquired as to whether the petitioner wished to pursue a lesser classification.

In response, the petitioner asserted that while the market research analyst position with the petitioner requires a master's degree with one year of experience, the company reduced the education requirement to a bachelor's degree in order to find as many potential candidates as possible while conducting the necessary recruitment. The petitioner notes that the wage surveys certified by the Illinois Department of Employment Security list the position as a "Level II" position requiring a master's degree. The petitioner concluded:

> We hope that your Office can take the above information into consideration, and approve current I-140 petition under 2nd preference.
>
> If your Office does not agree with the opinion we have, and insist the position only qualifies as 3rd preference position, rather than 2nd preference position, we are willing to accept such downgrade in order for your Office to continue the process of this I-140 petition.

Subsequently, the petitioner submitted a second response to the director's February 16, 2006 notice, advising that it had filed another ETA Form 9089 with DOL but that DOL denied the new ETA Form 9089 because another such application was already pending. The petitioner asked that the denied ETA Form 9089 be considered "our bona fide evidence to substantiate the fact that the minimum education requirement for the Market Research Analyst position as the Master Degree rather than the Bachelor Degree."

In the director's final decision, dated August 10, 2006, the director concluded that the position did not require at least a bachelor's degree plus five years of progressive experience and, thus, "the position does not qualify for second-preference."

On appeal, while the petitioner asserts that director's sole basis of denial was that the petitioner has not established that the beneficiary had the necessary experience, the petitioner notes that its first reply to the director's request for additional evidence expressed its willingness to accept a "downgrade" to third preference.

The director is under no obligation to consider a petition under a classification other than the classification designated on the Form I-140 petition, in this case second preference pursuant to section 203(b)(2)(A) of the Act, 8 U.S.C. § 1153(b)(2)(A). In this matter, however, the director explicitly inquired as to whether the petitioner wished to pursue a lesser classification. As the petitioner responded that it would accept a lower classification, the director should have considered the petition under section 203(b)(3) of the Act, 8 U.S.C. § 1153(b)(3).

For the reasons discussed below, however, the director's second basis of denial is valid. Thus, we need not remand the matter for a new decision under section 203(b)(3) of the Act, 8 U.S.C. § 1153(b)(3).

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, 8 U.S.C. § 1182(a)(5)(A)(i); 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,* 696 F.2d at 1012-1013.

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 that the legacy Immigration and Naturalization Service (INS), now Citizenship and Immigration Services (CIS), "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.

As stated above, the ETA Form 9089, Part H, reflects that a bachelor's degree plus one year of experience is required, with no alternate combination of education and experience permissible.

The regulation at 8 C.F.R. § 204.5(g)(1) provides, 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.

The petitioner initially submitted no documentation of the beneficiary's education and experience. In the February 16, 2006 request for additional evidence, the director requested evidence of the beneficiary's education and experience, noting that evidence of experience "must be in the form of letter(s) from the alien's current or former trainer(s) or employer(s) giving the name, address, and title of the trainer or employer and a description of the training received or the experience of the alien, including the dates of the training or employment and specific duties."

In response, the petitioner submitted evidence of the beneficiary's education, but did not submit letters from her former employers documenting at least one year of employment prior to the priority date. On this basis alone, the petition may not be approved. 8 C.F.R. § 103.2(b)(13). The director concluded that the petitioner had not established that the beneficiary has the necessary experience.

On appeal, the petitioner asserts that the beneficiary's past experience is listed on the ETA Form 9089, Part J and the director erred in failing to consider the beneficiary's employment prior to her employment with the petitioner. The petitioner does not submit letters from the beneficiary's former employers documenting that employment as required under 8 C.F.R. § 204.5(g)(1). Regardless, the petitioner's opportunity to submit that evidence for consideration was in response to the director's request for additional evidence, which explicitly requested letters from the beneficiary's employers. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533, 537 (BIA 1988). Thus, we uphold the director's decision that the petitioner has not submitted the required initial evidence of the beneficiary's experience as set forth at 8 C.F.R. § 204.5(g)(1), quoted above.

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.