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FILE: LIN 07 093 52637 Office: NEBRASKA SERVICE CENTER Date: NOV 07 2008

IN RE: Petitioner: [REDACTED]
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:



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 The decision of the director will be withdrawn, the appeal will be sustained, and the petition will be approved.

The petitioner is a computer consulting firm. It seeks to employ the beneficiary permanently in the United States as a lead computer consultant 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 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. Upon reviewing the petition, the director determined that the job offer did not require an advanced degree professional.

On appeal, counsel submits a brief and a letter from the petitioner. For the reasons discussed below, we withdraw the director's adverse findings.

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 regulation at 8 C.F.R. § 204.5(k)(4)(i) provides that the job offer portion of the individual alien employment certification "must demonstrate that the job requires a professional holding an advanced degree or the equivalent."

The beneficiary possesses a foreign four-year bachelor's degree and more than five years of progressive experience. The beneficiary's occupation falls within the pertinent regulatory definition of a profession. Thus, the beneficiary qualifies as a member of the professions holding an advanced degree as defined at 8 C.F.R. § 204.5(k)(2). The only issue in contention is whether the job offered requires a member of the professions holding an advanced degree.

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. Citizenship and Immigration Services (CIS) must look to the job offer portion of the alien employment certification to determine the required qualifications for the position. 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 v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th

Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The exact language of Part H, lines 4 through 10-A and the petitioner's responses are relevant to our evaluation and are repeated below.

- Line 4: Education: Minimum Level Required: "Bachelor's."
Line 6: Is experience in the job offered required for the job? "Yes."
Line 6-A: If Yes, number of months experience required: "60."
Line 8: Is there an alternate combination of education and experience that is acceptable? "Yes."
Line 8-A: If Yes, specify the alternate level of education required: "Master's"
Line 8-C: If applicable, indicate the number of years experience acceptable in question 8: "1."
Line 9: Is a foreign educational equivalent acceptable? "Yes."
Line 10: Is experience in an alternate occupation acceptable? "Yes."
Line 10-A: If Yes, number of months experience in alternate occupation required: "60."
Line 10-B: Identify the job title of the acceptable alternate occupation: "Computer Software Development."

Line 14: "Will accept any suitable combination of education, training or experience. Will accept degree equivalency based on combination of foreign sources."

The director concluded the language in line 14 indicated that the job did not require a member of the professions holding an advanced degree because current regulations "do not allow for a combination of (foreign) degrees and work experience to qualify as equivalent to an advanced degree." On appeal, counsel asserts that the language set forth in line 14 was not intended to suggest that education and experience would be accepted in lieu of a baccalaureate, but rather to allow a combination of an associate's degree and a baccalaureate or a baccalaureate following 13 years of primary and secondary education. Counsel submits a letter from the petitioner confirming its intent as stated by counsel.

First, the director erred in stating that no regulation allows a combination of education and experience to be considered "equivalent to an advanced degree." In fact, the regulation at 8 C.F.R. § 204.5(k)(2) expressly states that a baccalaureate followed by five years of progressive experience is equivalent to an advanced degree.

The regulations relating to the immigrant classification sought do not allow for a combination of education and experience to be considered equivalent to a U.S. baccalaureate. In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service

specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

In light of the above, if the certified job requires anything less than a bachelor's degree, the job does not require an advanced degree professional. 8 C.F.R. § 204.5(k)(2). We must, however, read the entire Part H in context. As quoted above, on line 14 the petitioner indicated that any "suitable" combination of education and experience would be acceptable. On lines 4 and 6, the minimum education and experience required are a bachelor's degree and five years of experience. On Line 8, the petitioner indicated that a combination of a Master's degree plus one year of experience would also be acceptable. The petitioner asserts the language in line 14 allowing for a combination of "foreign sources" merely allowed for a foreign educational equivalent such as an associate's/bachelor's combination or a baccalaureate following 13 years of primary and secondary education.

Accepting the petitioner's claimed intent, the last sentence in line 14 would appear to be unnecessary since a student who receives a baccalaureate after transferring from an associate's degree program still receives an actual baccalaureate and a foreign education equivalency would appear to include foreign baccalaureate programs that are truly equivalent to U.S. baccalaureate programs based on an evaluation of the number of years in the program and the number of years of primary and secondary education required to enter the program. Moreover, the petitioner already indicated that it would accept a foreign educational equivalency by responding affirmatively on line 9. Nevertheless, the petitioner listed the primary educational and experience requirements in lines 4 and 6 and the alternate requirements in lines 8-A through 8-C. While we do not discount the possibility that language in line 14 could undermine the job requirements set forth elsewhere in Part H, the language used in this matter, read in context with all of Part H, does not suggest that anything less than the requirements set forth in lines 4, 6, and 8 would be acceptable.

In light of the above, we are persuaded that the job requires an advanced degree professional.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has met that burden.

ORDER: The decision of the director is withdrawn. The appeal is sustained and the petition is approved.