



U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE:

[Redacted]

Date: JUL 25 2007

LIN 05 273 52120

BENEFICIARY:

[Redacted]

Request for Evidence

Dear [Redacted]

On September 27, 2005, you filed a Form I-140, Immigrant Petition for Alien Worker, seeking the beneficiary's services as a programmer analyst pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1153(b)(3)(A). You requested consideration as a skilled worker or professional. The Nebraska Service Center director evaluated the petition under the professional category and denied it on March 4, 2006. You have appealed this decision to the Administrative Appeals Office (AAO).

An issue on appeal in this case is whether your organization has demonstrated that the beneficiary is qualified to perform the duties of the proffered position as you have set forth on your Form ETA 750, Application for Alien Employment Certification (Form ETA 750 or labor certification application), that is, whether the beneficiary attended four years of college and possesses a four-year U.S. bachelor's degree or a foreign equivalent degree in computer science. There is no evidence in the record of proceeding that the beneficiary has a four year U.S. bachelor's degree or foreign degree equivalent.

Your organization did not specify on the Form ETA 750 that the minimum academic requirements of four years of college and a bachelor's degree in computer science or equivalent might be met through a combination of lesser degrees. The labor certification application, as certified, does not demonstrate that the petitioner would accept a combination of degrees that are individually all less than a four-year U.S. bachelor's degree or its foreign equivalent when it oversaw the petitioner's labor market test.¹

¹ The U.S. Department of Labor (DOL) has provided the following field guidance: "When an equivalent degree or alternative work experience is acceptable, the employer must specifically state on the ETA 750, Part A as well as throughout all phase of recruitment exactly what will be considered equivalent or alternative in order to qualify for the job." See Memo. from [Redacted], Acting Regl. Adminstr., U.S. Dep't. of Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep't. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994). DOL's certification of job requirements stating that "a certain amount and kind of experience is the equivalent of a college degree does in no way bind [Citizenship and Immigration Services (CIS)] to accept the employer's definition" and SESAs

The documentation in the record of proceeding as currently constituted creates ambiguity concerning the actual minimum requirements of the proffered position. Although the clearly stated requirements of the position on the certified labor certification application do not include alternatives to a four-year U.S. bachelor's degree, it is your contention now during the petition process before Citizenship and Immigration Services (CIS) that the actual minimum requirements do include at least what the beneficiary has achieved through a combination of education. Because of that ambiguity, the AAO is issuing this RFE to obtain evidence of your organization's intent concerning the actual minimum requirements of the position as that intent was explicitly and specifically expressed to the U.S. Department of Labor (DOL) while that agency oversaw the labor market test and determination of the actual minimum requirements set forth on the certified labor certification application. Such intent may have been illustrated through correspondence with DOL, amendments to the labor certification application initiated by DOL and your organization, results of recruitment, or other forms of evidence relevant and probative to illustrating your organization's intent about the actual minimum requirements of the proffered position and that those minimum requirements were clear to potential qualified candidates during the labor market test.

On Form ETA 750, Part A, Item 21, DOL requested information that describes "efforts to recruit U.S. workers and the results," "specify[ing] sources of the recruitment by name." This item requests recruitment information in order to allow DOL to determine whether your organization put forth good faith efforts to recruit U.S. workers which meet the regulatory guidelines found at 20 C.F.R. §§ 656.21(b)(1)(i)(A)-(F) and (ii)² or 20 C.F.R. § 656.21(j)(1)(i)-(iv),³ depending on whether or not the Form ETA 750 was submitted under a

should "request the employer provide the specifics of what is meant when the word 'equivalent' is used." See Ltr. From [REDACTED], Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to [REDACTED] Jackson & Hertogs (March 9, 1993). DOL has also stated that "[w]hen the term equivalent is used in conjunction with a degree, we understand to mean the employer is willing to accept an equivalent foreign degree." See Ltr. From [REDACTED], Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Joseph Thomas, INS (October 27, 1992). To our knowledge, these field guidance memoranda have not been rescinded.

² The regulation at 20 C.F.R. §§ 656.21(b)(1)(i)(A)-(F) and (ii) states the following (for the reduction in recruitment process permitting the employer to advertise and recruit without the supervision of DOL):

If the employer has attempted to recruit U.S. workers prior to filing the application for certification, the employer shall document the employer's reasonable good faith efforts to recruit U.S. workers without success through the Employment Service System and/or through other labor referral and recruitment sources normal to the occupation:

- (i) This documentation shall include documentation of the employer's recruitment efforts for the job opportunity which shall:
 - (A) List the sources the employer may have used for recruitment, including, but not limited to, advertising; public and/or private employment agencies; colleges or universities; vocational, trade or technical schools; labor unions; and/or development or promotion from within the employer's organization;
 - (B) Identify each recruitment source by name;
 - (C) Give the number of U.S. workers responding to the employer's recruitment;
 - (D) Give the number of interviews conducted with U.S. workers;

supervised or unsupervised advertising or recruitment process.⁴ We have found no document in the record addressing these efforts as required under 20 C.F.R. §§ 656.21(b) or (j). Because this document could illustrate your organization's intent about the actual minimum requirements of the proffered position and that it tested the U.S. labor market with those actual minimum requirements, the AAO requests that your organization provide evidence that it provided, *at the time it submitted to DOL its Form ETA 750 application and attachments*, the requisite "signed, detailed written report" of its reasonable good faith efforts to recruit U.S. workers prior to filing the application for certification. *See* 20 C.F.R. §§ 656.21(b) or (j).⁵

(E) Specify the lawful job-related reasons for not hiring each U.S. worker interviewed; and

(F) Specify the wages and working conditions offered to the U.S. workers; and

(ii) If the employer advertised the job opportunity prior to filing the application for certification, the employer shall include also a copy of at least one such advertisement.

³ The regulation at 20 C.F.R. § 656.21(j)(1) states the following (for a traditional submission of a Form ETA 750 and directed recruitment by the local state workforce agency):

The employer shall provide to the local office a written report of the results of all the employer's post-application recruitment efforts during the 30-day recruitment period; except that for job opportunities advertised in professional and trade, or ethnic publications, the written report shall be provided no less than 30 calendar days from the date of the publication of the employer's advertisement. The report of recruitment results shall:

(i) Identify each recruitment source by name;

(ii) State the number of U.S. workers responding to the employer's recruitment;

(iii) State the names, addresses, and provide resumes (if any) of the U.S. workers interviewed for the job opportunity and job title of the person who interviewed each worker; and

(iv) Explain, with specificity, the lawful job-related reasons for not hiring each U.S. worker interviewed.

⁴ The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM, for Program Electronic Review Management. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. However, the instant labor certification application was filed prior to March 28, 2005 and is governed by the prior regulations. This citation and the citations that follow are to the DOL regulations as in effect prior to the PERM amendments.

⁵ Under DOL's regulations, it is the responsibility of CIS to ensure that the labor market test was *in fact* carried out in accordance with applicable law. *See* 20 C.F.R. § 656.30(d). Your submission of the evidence requested therefore may help demonstrate that U.S. workers without four years of college and without bachelor's degrees were in fact put on notice that they were eligible to apply for the proffered position, despite the stated requirements of the Form ETA 750, and that your organization did not in fact exclude U.S. workers with qualifications similar to those of the beneficiary from applying for and filling the position.

Specifically, this office requests a complete copy of the Form ETA 750 as certified by DOL including any documentation that summarizes your organization's recruitment efforts and its explicitly expressed intent concerning the actual minimum requirements of the proffered position. CIS must be in receipt of the complete Form ETA 750 as certified by DOL, including any attachments which DOL incorporated into that form as discussed herein, before the petition may be approved. *See* section 203(b)(3)(C) of the Act; *see also* 8 C.F.R. § 204.5(a)(2)(which mandates that the Form I-140 be accompanied by the individual labor certification *as certified by DOL*)(emphasis added). We also ask that you please provide a copy of all supporting documents summarizing your organization's recruitment efforts, as previously presented to DOL, which might overcome any deficiencies or defects in the record outlined above.

You are hereby afforded 12 weeks to respond to this request for evidence. *See* 8 C.F.R. § 103.2(b)(8). If you choose to respond, please submit your response to the address shown on the first page of this letter. Also, please attach a copy of this letter on top of any such submission.



Robert P. Wiemann, Chief
Administrative Appeals Office

cc:

