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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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OCT 26 2007

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date:
SRC 06 800 21348

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:

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.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas 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 The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner is a computer software and consultancy business. It seeks to employ the beneficiary permanently in the United States as a programmer analyst 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 aliens of exceptional ability and 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. The director determined that the job offered did not require a member of the professions holding an advanced degree.

On appeal, the petitioner asserts that the position requires either a Master's degree plus two years of experience or a bachelor's degree plus five years and submits job advertisements with those job requirements. The petitioner provides an explanation for the alternative job requirements listed on the alien employment certification consistent with the instructions for that form. For the reasons discussed below, we find that the petitioner has overcome the director's basis of denial. The petition, however, is not approvable as filed. Thus, we must remand the matter to the director for an analysis of the petitioner's ability to pay the proffered wage.

Section 203(b) of the Act states in pertinent part that:

(2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --

(A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

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.) While the director failed to cite this regulation, it provides the legal basis for his ultimate conclusion.

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 Master's degree in computer science is the minimum level of education required. Line 6 indicates that two years of experience are required. Line 8 reflects that a combination of education or experience is acceptable in the alternative. Specifically, lines 8-A and 8-C reflect that the alternative combination consists of a bachelor's degree and three years of experience. Line 9 reflects that a foreign educational equivalent is acceptable.

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.

The regulation at 8 C.F.R. § 204.5(k)(2) defines an advanced degree as follows:

[A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate 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.

The director concluded that the alternative minimum requirements in this matter consist of a bachelor's degree plus three years of experience, which is not equivalent to an advanced degree. On appeal, the petitioner asserts that the job actually requires a bachelor's degree plus five years of experience in lieu of a Master's degree. The petitioner asserts that the bachelor's degree plus three years is an acceptable alternative to the Master's degree by itself and that an additional two years are

required pursuant to line 6, totaling five years of experience where the alien only has a bachelor's degree. As stated above, the petitioner submits advertisements reflecting that the petitioner advertised the position as requiring a Master's degree plus two years of experience or a bachelor's degree plus five years of experience.

We note that the instructions for the Form 9089 Part H, line 8, provide in pertinent part:

Select *Yes* or *No* to indicate if there is an alternate combination of education and experience in the job offered that will be accepted **in lieu of the minimum education requirement identified in question 4** of this section.

(Bold emphasis added.) Thus, the alternative education and experience listed on lines 8-A through 8-C, in this case a bachelor's degree plus three years of experience, is the alternative for the education listed on line 4, in this case a Master's degree, and not the alternative for the combination of education and experience required in lines 4 and 6, in this case a Master's degree plus two years of experience. Therefore, the petitioner's assertion that the minimum requirements are actually a bachelor's degree plus five years experience (the three years listed on line 8-C and the two years listed on line 6) is supported by the clear and unambiguous instructions for the Form 9089.

We note, however, that on September 7, 2006, the director requested evidence of the petitioner's ability to pay the proffered wage pursuant to the regulation at 8 C.F.R. § 204.5(g)(2). The petitioner's response, dated October 5, 2006, indicates that the petitioner's 2004 tax return was being submitted. That document, however, is not in the record. While we acknowledge that the petitioner claimed, in its response, to employ 166 employees, the petitioner did not submit a letter from its Chief Financial Officer attesting to its ability to pay the proffered wage.

Therefore, this matter will be remanded for consideration of the petitioner's ability to pay the proffered wage. The director may wish to take into account the fact that CIS electronic records reflect that the petitioner has filed approximately 2,000 immigrant and nonimmigrant visa petitions. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.