

Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

B5

PUBLIC COPY

FILE:

Office: VERMONT SERVICE CENTER

Date: OCT 02 2006

EAC 06 002 50877

IN RE:

Petitioner:  
Beneficiary:

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.

*Maui Johnson*

3 Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont 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 consulting services. It seeks to employ the beneficiary permanently in the United States as a "Sr. GIS Developer" 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 beneficiary did not satisfy the minimum level of experience (60 months in the job offered) stated on the labor certification.

On appeal, counsel submits a brief and additional employment letters. For the reasons discussed below, the appeal does not overcome the valid basis of denial.

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 beneficiary possesses a Ph.D. The petitioner's occupation falls within the pertinent regulatory definition of a profession. Thus, the beneficiary qualifies for the classification sought. At issue is whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

As noted above, the ETA Form 9089 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss DOL's role in this process. Section 212(a)(5)(A)(i) of the Act provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

According to 20 C.F.R. § 656.1(a), the purpose and scope of the regulations regarding labor certification are as follows:

(a) Under section 212(a)(5)(A) of the Immigration and Nationality Act (INA or Act) (8 U.S.C. 1182(a)(5)(A)), certain aliens may not obtain immigrant visas for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Secretary of Homeland Security that:

(1) There are not sufficient United States workers who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work; and

(2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

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 the job offered.

In *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9<sup>th</sup> Cir. 1983), the court 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.

*Id.* (citing *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. 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)(14) 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.) *K.R.K. Irvine, Inc.*, 699 F.2d at 1009. The Ninth Circuit revisited this issue, stating:

The Department of Labor (“DOL”) must certify that insufficient domestic workers are available to perform the job and that the alien’s performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien’s entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). See generally *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

*Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9<sup>th</sup> Cir. 1984).

To determine whether a beneficiary is eligible for a preference immigrant visa, CIS must ascertain whether the alien is, in fact, qualified for the certified job. CIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary’s qualifications, CIS must look to the job offer portion of the labor 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*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Finally, where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, CIS must examine “the language of the labor certification job requirements” in order to determine what the petition beneficiary must demonstrate to be found qualified for the position. *Madany*, 696 F.2d at 1015. 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.” *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 [labor certification application form].” *Id.* at 834 (emphasis added). 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 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 is the minimum level of education required. Line 6 indicates that 60 months experience in the job offered is required for the job. Line 8 reflects that no combination of education or experience is acceptable in the alternative.

On Part J of the labor certification, the beneficiary indicated the following experience:

Employer	Dates	Job Title	Hours per Week
The petitioner	4/1/04 to present	Senior GIS developer	40
	6/1/02 to 4/1/04	Software Eng. Manager	40
	11/1/01 to 6/1/02	Senior Scientist	40

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.

Initially, however, the petitioner submitted no evidence of the beneficiary's claimed employment experience. Thus, on January 11, 2006, the director requested evidence that the beneficiary had the claimed experience. The director quoted the regulation at 8 C.F.R. § 204.5(g)(1), quoted above.

In response, the petitioner submitted a letter from the petitioner and three reference letters discussing the significance of the petitioner's work, two of which assert that the petitioner's work is in the national interest. Counsel asserts that the job duties, if not the job titles, reflect that the petitioner has five years of experience in GIS. Neither counsel nor any of the references asserted that the beneficiary attempted to obtain experience letters from his actual employers but was unable to do so.

Dr. [REDACTED] a research scientist at the U.S. Department of Agriculture (USDA), asserts that he worked closely with the beneficiary from August 1996 to November 2001 while the beneficiary was studying for his Ph.D. [REDACTED] asserts that the beneficiary held a research assistant position with USDA Forest Service and that he worked "half time."

Dr. [REDACTED] Chief Scientist IUCN of The World Conservation Union, asserts that he was an advisor to the Biodiversity Research and Information Management Project funded by the

World Bank and that the beneficiary was the Project Manager in charge of the project. Dr. [REDACTED] asserts that he met the beneficiary in 1995 regarding this project but does not discuss whether the beneficiary's work on this project was full-time or the length of this employment.

[REDACTED] President of [REDACTED] asserts that he met the beneficiary while employed by [REDACTED] where Mr. [REDACTED] managed a \$10 million federal contract for [REDACTED]. According to Mr. [REDACTED] the beneficiary joined [REDACTED] in June 2002 and was promoted to software engineering manager on an unknown date. Finally, Mr. [REDACTED] asserts that before joining [REDACTED] the beneficiary "was a senior scientist with [REDACTED] Arlington, VA." Mr. [REDACTED] does not explain how he has first-hand knowledge of that employment.

The director concluded that the above letters were insufficient as they were not from the beneficiary's employers and did not include the information required by the regulation at 8 C.F.R. § 204.5(g)(1), such as the beginning and ending dates of the employment.

On appeal, counsel notes that the regulation at 8 C.F.R. § 204.5(g)(1) provides that if letters from employers are unavailable, "other documentation relating to the alien's experience will be considered." Counsel asserts that upon receipt of the director's request for evidence, the beneficiary contacted his employers but found that those who knew him had left the companies and the human resources departments "had no recollection of his employment." Thus, counsel asserts, the beneficiary obtained the reference letters from people who worked with him.

Counsel notes that Dr. [REDACTED] "provided a detailed time frame – from August 1996 to November 2001." Counsel fails to acknowledge that Dr. [REDACTED] also indicates that this work was part-time. Counsel further notes that Dr. [REDACTED] asserts that he recruited the beneficiary in 2002 and references a conference in 2003. Counsel concludes that it is "clear from these two letters that [the beneficiary] had worked from August 1996 through at least 2003 with US government agencies and companies primarily on GIS technology related projects."

In addition, counsel notes that the beneficiary has three years of education beyond the Master's required on the labor certification. Finally, counsel asserts that the beneficiary was recruited to assist on government projects and that denying the petition is not in the best interest of the United States.

In support of the appeal, the petitioner submits new letters from (1) the petitioner, (2) [REDACTED] Project Director of [REDACTED] attesting to the beneficiary's employment there from June 2002 to April 2004, (3) [REDACTED] Director of Human Resources for [REDACTED] asserting that the beneficiary worked full-time on GIS projects there from November 12, 2001 through May 30, 2002 as an Engineer/Scientist and (4) Dr. Heisler reiterating his previous assertions.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of

inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Counsel's assertion that the primary evidence required, employment verification from the beneficiary's employers, was unavailable is not persuasive. Neither counsel nor the petitioner claimed in response to the director's request that such evidence was unavailable. Moreover, pursuant to the regulation at 8 C.F.R. § 103.2(b)(2), where primary evidence is unavailable or does not exist, it is the petitioner's burden to demonstrate that fact. **The non-existence or unavailability of required evidence creates a presumption of ineligibility.** The petitioner did not submit letters from the human resources departments of his former employers affirming that they had no record of his employment and explaining why that was the case. In fact, the petitioner now submits a letter from Schafer, with no explanation of why they were unable to provide a letter previously.

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

As discussed above, the evidence before the director demonstrated only part-time employment from 1996 through 2001 and employment for [REDACTED] beginning in 2002. Mr. [REDACTED] does not indicate whether the employment for [REDACTED] was full-time. We note that the beneficiary was a Ph.D. student during part of the time he worked for [REDACTED] and, according to his transcript, was involved in a graduate internship. The record contains no attestations of wages or Forms W-2.

"Employment" means permanent *full-time* work by an employee for an employer other than oneself. 20 C.F.R. § 656.3. Even if we were to consider the beneficiary's part time employment for USDA from 1996 through 2001, we cannot consider 63 months of part time work to be equivalent to 60 months of full time work. The letter from Mr. [REDACTED] **does not comply with the requirements at 8 C.F.R. § 204.5(g)(1) and, thus, cannot constitute evidence of qualifying experience.** Any consideration of the beneficiary's employment in the job offered with the petitioner towards his qualifying experience would suggest that the petitioner did not accurately advise DOL of the actual minimum requirements for the job. *See* 20 C.F.R. § 656.17(i)(1).

Counsel's request that we consider the beneficiary's education beyond that required for the job is not persuasive. As stated above, the labor certification indicates that an alternate combination of education and experience is not acceptable. Thus, education cannot be considered in lieu of experience. We note that the petitioner obtained his Ph.D. on August 15, 2003. His transcript reflects that he began his doctoral thesis research entitled "An Analysis of an Expert System Used to Predict Human Thermal Comfort in Outdoor Urban Settings" in the Fall of 1996, the subject of the "employment" discussed by Dr. [REDACTED] and that beginning in September 2001, the petitioner participated in a graduate internship for credit. The petitioner has not established that his thesis research and graduate internship constitute employment experience. *Cf.* 8 C.F.R. § 204.5(i)(3)(ii), Fed. Reg. 60867, 60899 (November 29, 1991) (after consideration of commentary to the proposed rule

excluding student research experience from the three year experience requirement for outstanding professors and researchers, the final rule permits consideration of research experience while working towards a Ph.D., but *only* if that research is deemed “outstanding.”)

Finally, counsel’s hardship assertions cannot overcome the petitioner’s failure to establish that the beneficiary was qualified for the job offered as of the date of filing. Counsel does not provide a legal authority, and we know of none, that would allow CIS to consider such assertions in petitions involving certification from DOL.

In light of the above, the beneficiary does not meet the job requirements on the labor certification. Thus, the petition cannot be approved.

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.