



U.S. Citizenship
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Services

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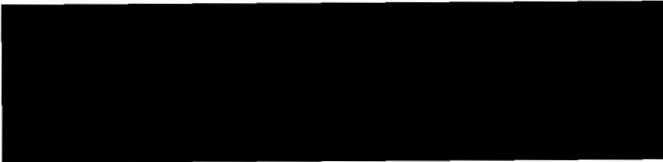
Office: NEBRASKA SERVICE CENTER

Date: **MAY 05 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 appeal will be dismissed.

The petitioner is a hotel with a banquet and conference hall. It seeks to employ the beneficiary permanently in the United States as a database administrator 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. The director's decision was based on two factors: no major field of study was specified as required and the alternative educational requirements were less than a baccalaureate.

On appeal, counsel submits a brief, copies of previously submitted documentation and a copy of the relevant regulations. For the reasons discussed below, counsel legal assertions are not persuasive. While we do not find the failure to designate a field of study determinative, the overall job requirements, as noted by the director, reveal that the position is not a profession and that it does not require a member of the professions holding an advanced degree.

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.)

On appeal, counsel acknowledges the above regulation but concludes that “determining the issue of qualification is within the competence and jurisdiction of the Department of Labor and not the Immigration Service.” Counsel relies on *Hoosier Care, Inc. v. Chertoff*, 482 F. 3d 987 (7th Cir. 2007). That decision, however, involved a lesser classification than the one sought in this matter and the court explicitly relied on the regulation at 8 C.F.R. § 204.5(1)(4). That regulation does not relate to members of the professions holding an advanced degree and no similar language appears in the regulation at 8 C.F.R. § 204.5(k), which does relate to the classification at issue in this matter. Moreover, the court in *Hoosier* was concerned that Citizenship and Immigration Services (CIS) was reevaluating whether the job requirements certified by DOL were proper. In this matter, the issue is not whether job requirements are proper or even whether the beneficiary is qualified for the job (the ultimate issue in *Hoosier*), but whether the job requirements, as certified by DOL, reflect that the job requires a member of the profession holding an advanced degree. According to the plain language of 8 C.F.R. § 204.5(k), that is an inquiry CIS is authorized to make. Moreover, federal circuit courts have acknowledged that there is no doubt that the authority to make preference classification decisions rests with CIS. *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). *See also Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984).

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.

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). CIS must examine “the language of the labor certification job requirements” in order to determine what the job requires. *See generally 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.

In this matter, Part H, line 4, of the labor certification reflects that a Master’s degree in any field is the minimum level of education required. Line 8, however, reflects that a combination of education or experience is acceptable in the alternative. Line 8-A allows the petitioner to specify the alternate

level of education required. While a bachelor's degree is one of the choices, the petitioner selected "other." Line 8-B requires the employer to elaborate if "other" is indicated. The petitioner responded: "Any suitable combination of education, training and/or experience equivalent [sic]." Line 8-C requires the employer to indicate the alternate number of years of experience that are acceptable. The petitioner indicated no years of experience were required in the alternative. Line 9 reflects that a foreign educational equivalent is acceptable. Line 14 reiterates that any "suitable combination of education, training and/or experience equivalent to a U.S. Master's Degree" is acceptable.

As defined at section 101(a)(32) of the Act, the term profession "shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The regulation at 8 C.F.R. § 204.5(k)(2), in pertinent part, defines "profession" as follows:

[O]ne of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

The director acknowledged these definitions, but then relied on *Matter of Shin*, 11 I&N Dec. 686 (Dist. Dir. 1966) and *Matter of Palanky*, 12 I&N Dec. 66 (Regl. Commr. 1966), for the proposition that the degree must be related to the field. We note that in *Matter of Shin*, 11 I&N Dec. at 688, the District Director did state that a degree in and of itself was insufficient; rather, the "knowledge acquired must also be of [a] nature that is a realistic prerequisite to entry into the particular field of endeavor." The following discussion, however, was limited to the level of education required, not the major field of study. Moreover, *Matter of Palanky*, 12 I&N Dec. at 68, addressed an occupation that did not require a full baccalaureate. Most significantly, these cases predate the regulation at 8 C.F.R. § 204.5(k)(2). Therefore, we must defer to the definition in that regulation, which states only that a profession must require a baccalaureate for entry into the occupation and does not specify that the baccalaureate need be in a related field.

As stated above, however, while we may not reevaluate whether the job requirements certified by DOL are proper, DOL certification does not bind us in determinations of eligibility for a specific visa classification. *Madany*, 696 F.2d at 1012-1013; *Tongatapu Woodcraft Hawaii, Ltd.*, 736 F. 2d at 1309. Moreover, to hold otherwise would undermine congressional intent. More specifically, if CIS was limited to reviewing a petitioner's self-imposed employment requirements in determining whether a specific job is a profession, then any alien with a bachelor's degree could be brought into the United States under section 203(b)(2) of the Act to perform non-professional employment. *See generally Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000)(only considering the employer's requirements would lead to absurd results).¹

¹ Moreover, the regulation provides that a profession is an occupation for which a United States baccalaureate degree or its foreign equivalent is the *minimum* requirement for *entry* into the occupation. Thus, some professions may require *more* than a baccalaureate in an unspecified field for *entry* into that particular profession. In such cases, the director would be justified in considering, independent of whether the alien meets the job

In this matter, as noted by the director, the job requirements as certified by DOL fall below the requirements for a member of the professions holding an advanced degree. By checking “other” on line 8-A, the petitioner clearly indicated that it would accept less than a baccalaureate. Thus, the job is not a “profession” as defined at section 101(a)(32) of the Act and 8 C.F.R. § 204.5(k)(2).

Moreover, the job certainly does not require a member of the professions holding an advanced degree as mandated by the regulation at 8 C.F.R. § 204.5(k)(4). 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).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. While the beneficiary in this matter may qualify as a member of the professions holding an advanced degree, that does not end our inquiry. As discussed above, the job as certified by DOL must also require a member of the professions holding an advanced degree. 8 C.F.R. § 204.5(k)(4). As the petitioner indicated that someone with less education than a baccalaureate could qualify, the job does not require a member of the professions holding an advanced degree.²

requirements certified by DOL and is a member of some other profession, whether the alien can truly be considered a member of the profession most related to the occupation certified by DOL.

² Our finding is supported by the O*NET data available on the Internet. Specifically, the O*NET provides, under the “details” link for database administrators, that only 72 percent of database administrators have a bachelor’s degree or higher. See <http://online.onetcenter.org/link/details/15-1061.00>. Thus, more than one in four database administrators do not have a baccalaureate, suggesting that level of education is not *required* for entry into the occupation.

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.

This denial is without prejudice to the filing of a new petition under a lesser classification.

ORDER: The appeal is dismissed.