

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

PUBLIC COPY

B5

[REDACTED]

FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: **NOV 10 2008**
LIN 07 081 51178

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:

[REDACTED]

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 an architectural firm. It seeks to employ the beneficiary permanently in the United States as an architect 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 an alien of exceptional ability. The director did not reach the issue of whether the beneficiary qualifies as an alien of exceptional ability.

On appeal, counsel submits a brief. For the reasons discussed below, we find that the director's conclusion is supported by the plain language of the regulation at 8 C.F.R. § 204.5(k)(4), which is binding on us. Beyond the decision of the director, we also find that the beneficiary does not qualify for classification as an alien of exceptional ability and that the record lacks any evidence of the petitioner's ability to pay the proffered wage as required under 8 C.F.R. § 204.5(g)(2). The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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)(i) provides the following, in pertinent part:

The job offer portion of the individual labor certification . . . must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.

The petitioner seeks to classify the beneficiary as an alien of exceptional ability. The regulation at 8 C.F.R. § 204.5(k)(3)(ii) provides the following criteria for aliens of exceptional ability, at least three of which must be met:

- (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
- (B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;
- (C) A license to practice the profession or certification for a particular profession or occupation;
- (D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;
- (E) Evidence of membership in professional associations; or
- (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

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.

Citizenship and Immigration Services (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 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.*, 699 F.2d 1006 (9th Cir. 1983); *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 there is no minimum level of education required. Line 6 reflects that 48 months of experience in the job offered is required. Line 8 reflects that no combination of education or experience is acceptable in the alternative. Line 10 reflects that experience in an alternate occupation is not acceptable.

The job certified by DOL does not require any education. Thus, it does not require a degree, diploma, certificate or similar award. The job certified by DOL does not require more than four years of experience. Thus, it does not require at least 10 years of experience. No specific skills or other requirements are listed under Part H, line 14. Thus, the job does not require a license to practice as an architect or any professional memberships. The offered salary is equal to the prevailing wage. Thus, the job does not command a salary or other remuneration indicative of exceptional ability. We acknowledge that the type of recognition specified at 8 C.F.R. § 204.5(k)(3)(ii)(F) would be difficult to express on an application for alien employment certification. Nevertheless, the first five criteria for aliens of exceptional ability appear amenable to enumeration on an application for alien employment certification for an architect.

On appeal, counsel asserts that DOL will deny an application for alien employment certification with special requirements that are not proven by business necessity. Counsel notes that the regulation at 8 C.F.R. § 204.5(k)(4) makes no mention of a business necessity and asserts that it “seems infeasible that any employer can prove that finding a candidate with exceptional ability that satisfies three of the six evidence requirements is a business necessity.” Counsel concludes that the contradiction makes the classification “impracticable,” which “could not possibly have been the legislature’s intent.”

Counsel is not persuasive. Section 203(b)(2)(A) provides classification for aliens of exceptional ability “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.” An alien of exceptional ability who, but for her exceptional ability, would be admitted in a lesser classification, will not benefit prospectively the United States by working in a job certified by DOL as capable of being filled by a qualified but non-exceptional employee.

Of more concern, it appears that the job certified by DOL not only does not require an architect of exceptional ability, it does not even appear to require a minimally qualified architect. Specifically, the *Occupational Outlook Handbook*, published by DOL, provides in pertinent part:

There are three main steps in becoming an architect. First is the attainment of a professional degree in architecture. Second is work experience through an internship, and third is licensure through the passing of the Architect Registration Exam.

Education and training. In most States, the professional degree in architecture must be from one of the 114 schools of architecture that have degree programs accredited by the National Architectural Accrediting Board. However, State architectural registration boards set their own standards, so graduation from a non-accredited program may meet the educational requirement for licensing in a few States.

Three types of professional degrees in architecture are available: a 5-year bachelor's degree, which is most common and is intended for students with no previous architectural training; a 2-year master's degree for students with an undergraduate degree in architecture or a related area; and a 3- or 4-year master's degree for students with a degree in another discipline.

See <http://www.bls.gov/oco/ocos038.htm#training> (accessed November 16, 2008).

We acknowledge that we do not have the jurisdiction to reevaluate DOL's decision to certify the alien employment certification. We do, however, have the authority to make preference classification decisions. See *Madany v. Smith*, 696 F.2d 1008, 1012 (D.C. Cir. 1983) (citing *Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977)).

DOL has the authority to make the two determinations listed in section 212(a)(14) [current section 212(a)(5)].¹ *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(5) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

Madany v. Smith, 696 F.2d 1008, 1012 (D.C. Cir. 1983).

The job certified by DOL does not even require the bare minimum requirements for an architect, a professional degree in architecture and the necessary license. Thus, we cannot classify the job as one requiring an architect of *exceptional ability*.

The minimal job requirements also raise the question of whether the petitioner is, in fact, offering the beneficiary a job as an architect. The petitioner acknowledges that the beneficiary, while a licensed architect in Brazil, is not licensed in New York. The petitioner has not established that the beneficiary is eligible for an architect's license in New York as the record does not contain New York's licensing requirements.

Beyond the decision of the director, we further find that the beneficiary does not qualify as an alien of exceptional ability. The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below; qualifications possessed by every member of a given field cannot

¹ As amended by Sec. 601, and as further amended by Sec. 172 of the Immigration Act of 1990, Act of Nov. 29, 1990, Pub. L. 101-649, 104 Stat. 4978; however, the changes made by Sec. 162(e)(1) were repealed by Sec. 302(e)(6) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-323, 105 Stat. 1733, effective as though that paragraph had not been enacted.

demonstrate “a degree of expertise significantly above that ordinarily encountered.” The petitioner claims to meet the following criteria.

An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability

Section 203(b)(2)(C) of the Act provides that the possession of a degree, diploma, certificate or similar award from a college, university school or other institution of learning shall not by itself be considered sufficient evidence of exceptional ability. Thus, we must determine whether the beneficiary’s degree is indicative of or consistent with a degree of expertise significantly above that ordinarily encountered in the occupation. To hold otherwise, and not examine the nature of the degree, diploma, certificate or similar award in the context of the alien’s occupation, would result in the untenable finding that an associate’s degree in an occupation that normally requires a Ph.D. is sufficient to meet this criterion.

The beneficiary received the title of Architect and City Planner from Braz Cubas University on March 14, 2002. Counsel asserts that this was a five year degree. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The beneficiary’s transcript, however, reflects courses in 1997, 1998, 1999, 2000 and 2001. Thus, we are satisfied it was a five-year degree.

As stated above, however, the Online *Occupational Outlook Handbook* reflects that a five-year baccalaureate is the minimum educational requirement for an architect. Thus, the beneficiary’s degree is required to practice in his profession, it is not indicative of or consistent with a degree of expertise significantly above that ordinarily encountered. Rather, the beneficiary has the bare minimum education required for the occupation.

Thus, the petitioner has not established that the beneficiary meets this criterion.

Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought

The petitioner submitted foreign language employment letters and uncertified translations purporting to verify that the beneficiary worked on a “project team” from December 1, 2001 through March 30, 2004 for DSA Trade show & Exhibitions, Inc. and “developed important projects” for Z500 from March 2004 through February 2006. Neither letter specifies that the beneficiary worked as an architect. Moreover, the petitioner did not provide certified translations as required under 8 C.F.R. § 103.2(b)(3). Regardless, the petitioner does not assert that the beneficiary has the necessary 10 years of experience in the occupation specified on the petition, architect. Rather, counsel suggests that perhaps the beneficiary’s years as a student might be considered. Counsel is not persuasive. Education is considered under a separate criterion, 8 C.F.R. § 204.5(k)(3)(ii)(A). This criterion

clearly requires evidence from former employers, not academic institutions where the beneficiary was a student.

Thus, the petitioner has not established that the beneficiary meets this criterion.

A license to practice the profession or certification for a particular profession or occupation

Section 203(b)(2)(C) of the Act provides that the possession of a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of exceptional ability. Thus, we must determine whether the beneficiary's license is indicative of or consistent with a degree of expertise significantly above that ordinarily encountered.

The beneficiary is licensed as an architect and city planner in Brazil. The record contains no evidence that licensing in Brazil is indicative of a degree of expertise above that ordinarily encountered in the occupation rather than a requirement to practice as an architect in Brazil.

Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability

The petitioner submitted a foreign language document purporting to verify that the average salary for an architect in Brazil is R\$1,506.93. The document, however, is not accompanied by a complete and certified translation as required under 8 C.F.R. § 103.2(b)(3). Thus, this document has little evidentiary value. An "Explanation" in the record references an accountant's letter confirming that the beneficiary earned wages of R\$5,700.00. There is no accountant's letter in the record. Moreover, confirmation of the beneficiary's wages should be in the form of tax forms or confirmation from her employer. The petitioner did submit a document from the Ministerio da Fazenda. This document, however, is in a foreign language and the petitioner did not submit a certified translation (or any translation) as required under 8 C.F.R. § 103.2(b)(3). Thus, this document has little evidentiary value. The petitioner also submitted the beneficiary's bank records, but these records do not identify the deposits as deriving from employment income.

In light of the above, the petitioner has not established that the beneficiary meets this criterion.

Evidence of membership in professional associations

The beneficiary is a member of the American Institute of Architects (AIA) and, according to an uncertified translation, the Brazilian Institute of Architects. The petitioner did not submit the membership requirements for either association. It would appear that the AIA does not even require that a member be licensed to work as an architect in the United States as the petitioner acknowledges that the beneficiary is unlicensed in the United States.

Without evidence that membership is indicative of or consistent with a degree of expertise above that ordinarily encountered in the field, we cannot conclude that the beneficiary meets this criterion.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

Counsel asserted that the beneficiary meets this criterion because she was recognized as being at the top of her class and through receipt of “another award she received for professional formation in April 2002.” Student class standing is not a professional achievement but an academic achievement that only compares the recipient with other students in her class. It is certainly not indicative of a significant contribution to the industry or field.

The petitioner submitted uncertified translations for documents pertaining to the “CREA-SP Award of Professional Formation.” The recognition also appears to be for academic achievement, specifically: “For excellence [sic] in the course of Architecture and Urbanism of Braz Cubas University.”

As the record contains no evidence of professional recognition for contributions to architecture as a field rather than academic recognition, the petitioner has not established that the beneficiary meets this criterion.

In the aggregate, the petitioner has demonstrated only that the beneficiary was a successful architecture student who appears to have obtained the necessary education and license in Brazil to practice in her field and has gained at least some experience in her field. Her credentials are not indicative of or consistent with a degree of expertise above that normally encountered in the field of architecture. Rather, she meets the minimum requirements for her occupation.

Finally, the regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted for processing on September 25, 2006. The proffered wage as stated on the ETA Form 9089 is \$23.12 per hour, which amounts to \$48,089.60 annually. On the ETA Form 9089, Part J, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. The petitioner did not submit any of the evidence specified as initial required evidence at 8 C.F.R. § 204.5(g)(2). Specifically, the petitioner did not submit its annual reports, federal tax returns or audited financial statements.

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not 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.

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

ORDER: The appeal is dismissed.