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U.S. Citizenship  
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Services

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FILE: [REDACTED]  
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Office: NEBRASKA SERVICE CENTER

Date: **OCT 16 2008**

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

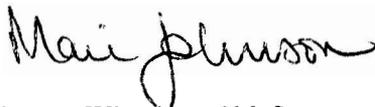
PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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 public university. It seeks to employ the beneficiary permanently in the United States as an associate professor<sup>1</sup> 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, a Form ETA 750,<sup>2</sup> 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 education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a Ph.D. as of the priority date.

On appeal, counsel asserts that section 204(b) of the Act requires Citizenship and Immigration Services (CIS) “to consult with the Secretary of Labor before entering any denials.” Counsel requests that CIS initiate a consultation and that counsel be included in the consultation. Counsel further asserts that the same section requires CIS to approve petitions “if all facts stated in the labor certification are true.” Counsel seriously mischaracterizes section 204(b) of the Act. In addition, counsel relies on a federal court case involving the deportation of a nonimmigrant. This case has been distinguished by another federal court, which has concluded that it does not relate to the adjudication of immigrant petitions. Further, counsel supplemented the appeal with arguments based on a recent court decision by the Seventh Circuit. Rather than support counsel’s position, the court states that while CIS cannot second guess the job requirements, CIS *is* justified in examining whether the alien is qualified for the job certified.

Ultimately, the alien employment certification requires a Ph.D. and the record reveals that a doctoral degree is customarily required for entry into the beneficiary’s occupation. There is no indication that any equivalence of this degree would be acceptable and, as will be discussed below, the regulation at 8 C.F.R. § 204.5(k)(2) does not permit any equivalencies for a doctoral degree other than a foreign equivalent degree. The beneficiary had not completed her dissertation and, thus, had not been awarded her Ph.D. or even approved to receive her Ph.D. as of the priority date in this matter. Thus, the beneficiary was not eligible as of the date of filing. Counsel’s attempt to distinguish the leading precedent decision on this issue, *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971), is not persuasive.

Finally, on July 25, 2008, this office issued a notice expressing an intent to invalidate the alien employment certification and enter a formal finding of fraud against the beneficiary based on her indication on the Form ETA 750B that she already had a Ph.D. 20 C.F.R. § 656.30(d). *See Matter*

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<sup>1</sup> The job title on the alien employment certification was amended to assistant professor. That is the job title ultimately certified. The Department of Labor regulation at 20 C.F.R. § 656.30(b)(2) provides that a labor certification involving a specific job offer is valid only for the particular job opportunity.

<sup>2</sup> After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

*of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Commr. 1986) (invalidating an alien employment certification at the appellate stage). In response, counsel asserts that the beneficiary provided her Curriculum Vitae to DOL, which indicated that the Ph.D. was only “expected” and that any error was not “material” at the time the beneficiary signed the Form ETA 750B because the initial education requirement proposed to DOL was a Master’s degree.<sup>3</sup> While we are not persuaded that the petition is approvable, we are persuaded that invalidating the alien employment certification and entering a formal finding of fraud against the beneficiary are not appropriate in this case.

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). Significantly, the regulation further states: “If a doctoral degree is customarily required by the specialty, *the alien must have a United States doctorate or a foreign equivalent degree.*” *Id.* (Emphasis added.)

The petitioner must demonstrate the beneficiary’s eligibility as of the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d); 8 C.F.R. § 103.2(b)(12) and *Matter of Katigbak*, 14 I&N Dec. at 49. Counsel’s assertions as to why *Matter of Katigbak* is not applicable will be discussed below. It is important to note at this point, however, that the Form ETA 750 in this matter was accepted for processing on November 24, 1999.

As noted above, the ETA 750 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:

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<sup>3</sup> Counsel also asserts that CIS has no authority to make a finding of fraud against the petitioner, a public university and, thus, part of a sovereign state. We need not address any of these assertions as we never proposed to enter a finding of fraud against the petitioner.

Under § 212(a)(5)(A) of the Immigration and Nationality Act (INA) (8 U.S.C. 1182(a)(5)(A)) certain aliens may not obtain a visa 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 Attorney General 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.

Section 204(b) of the Act states:

After an investigation of the facts in each case, and after consultation with the Secretary of Labor with respect to petitions to accord a status under section 203(b)(2) or 203(b)(3), the Attorney General shall, if he determines that the facts stated in the petition are true *and* that the alien in behalf of whom the petition is made is an immediate relative specified in section 201(b) or *is eligible* for preference under subsection (a) or (b) of section 203, *approve* the petition and forward one copy thereof to the Department of State. The Secretary of State shall then authorize the consular officer concerned to grant the preference status.

(Emphasis added.) On appeal, counsel asserts that this provision requires CIS to approve the petition if all facts on the alien employment certification are true. Counsel also interprets this provision as requiring some type of official face-to-face consultation between CIS and DOL, including the parties to the petition, prior to denial. The plain language of section 204(b) of the Act does not support counsel's interpretation on either point.

First, section 204(b) of the Act states that if the facts stated *in the petition* are true *and* the alien is eligible for preference classification, then CIS shall approve the petition. Section 291 of the Act provides:

Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not inadmissible under any provision of this

Act, and, if an alien, that he is entitled to the nonimmigrant; immigrant, special immigrant, immediate relative, or refugee status claimed, as the case may be.

The law goes on to assert that the evidence must establish eligibility “to the satisfaction” of the adjudicating officer. This burden is confirmed in *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). Regardless, as will be discussed below, the facts stated on the ETA 750B, signed under penalty of perjury by the beneficiary, are *not* true. Specifically, the beneficiary indicated that she received her Ph.D. in July 1999 when she had not, in fact, completed her dissertation at that point. Rather, the beneficiary received her Ph.D. on May 12, 2001, a fact she clearly understands as she lists 2001 as the year in which she received her Ph.D. on her current curriculum vitae.

Second, the law does not require CIS to arrange a comprehensive consultation meeting with DOL every time CIS denies a Form I-140 petition supported by an alien employment certification. In fact, section 204(b) of the Act relates to “each case” and, by its plain language, states what is required before *approval*, without directly addressing *denials*. Most significantly, there is no suggestion in section 204(b) of the Act that the petitioner and its counsel are entitled to participate in any consultations.

On the broader question of the concept of “consultation,” it is instructive to consider how Congress has used this term in other contexts. For example, section 214(c)(3) of the Act provides that CIS can only approve a nonimmigrant petition under section 101(a)(15)(O)(i) of the Act after “consultation.” Section 214(c)(6) of the Act explains that the consultation requirement is met through a written advisory opinion from the alien’s peer group or similar entity, depending on the alien’s field. Thus, it is clear that Congress does not always use the word “consultation” in a manner requiring an actual meeting of parties.

Relating to the matter at hand, unlike section 214(c) of the Act, section 204(b) of the Act does not further define “consultation,” suggesting that Congress did not feel it necessary to elaborate on this issue because it was self-evident from the division of authority between the legacy Immigration and Naturalization Service (INS), now CIS, and DOL. Congress designed the alien employment certification process whereby DOL would certify “to the Secretary of State and the Attorney General” (now the Secretary of Homeland Security) that there are insufficient workers and the employment of the alien will not adversely affect wages and working conditions in the United States. The fact that DOL is issuing the certification to us, not in a general sense or to Congress, and the fact that Congress failed to specify any additional type of consultation support our contention that, in most situations, the certification by DOL can serve as the consultation. As the alien certification certified by DOL would appear to be akin to a written advisory opinion, it would appear that, in most circumstances, a review of the alien employment certification certified by DOL would suffice as a “consultation.”

This is further supported by the fact that alien employment certification is used to make a determination of an individual alien’s admissibility under section 212(a)(5)(A) of the Act. Visa petition procedures are generally not the forum for determining substantive questions of admissibility under the immigration laws. When eligibility for the claimed status is established, the petition should be granted. *Matter of O*, 8 I&N Dec. 295 (BIA 1959). The fact that Congress has required this

determination prior to approval of a petition rather than solely at the adjustment stage, however, further suggests the reading that the alien employment certification itself is the consultation.

In *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Regl. Commr. 1977), the Regional Commissioner characterized the alien employment certification as an advisory opinion. Significantly, the regulation at 8 C.F.R. § 204.5(g) as in effect at the time of *Wing's Tea House* stated that the alien employment certification constituted DOL's endorsed "advisory opinion." The Regional Commissioner emphasized that DOL's "opinion of the alien's qualifications is only advisory in nature. Issuance of a labor certification is not simply a determination that the alien has been found to possess the requirements outlined" on the alien employment certification. **While 8 C.F.R. § 204.5(g) no longer contains language characterizing the alien employment certification as an "advisory opinion," no additional procedure for consultation is provided as an alternative.** Thus, it is clear that CIS and its predecessor agency, legacy INS, have always viewed the alien employment certification as the proper consultation with DOL in the vast majority of cases.

That said, we acknowledge that the federal court in *Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983), stated:

We recognize that the statutory division of authority between DOL's labor certification determination and INS' preference classification decision can lead to some discontinuity insofar as DOL-imposed job requirements are subject to interpretation by INS in its review of the alien's qualifications. Accordingly, INS will need the sensitivity to coordinate DOL and INS interpretations and to follow the Act's directive to consult with DOL **when correctable discrepancies between the alien's qualifications and the labor certification job requirements appear.** INS must also recognize that DOL bears the authority for setting the *content* of the labor certification and that it cannot impose job qualifications beyond those contemplated therein. However delicate that task may be in future cases, we have no reason to upset the decision of INS in this case.

*Id.* (Bold emphasis added.) We are not persuaded that "correctable discrepancies between the alien's qualifications and the labor certification job requirements" exist in this matter. Rather, we find that this matter involves a straightforward finding that the beneficiary did not possess the degree explicitly required on the alien employment certification as of the date of filing, despite claiming that she did.

Notably, federal courts have upheld our authority to review the alien's qualifications without inquiring into any formal, face-to-face "consultation" between legacy INS, now CIS, and DOL. *See K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9<sup>th</sup> Cir. 1983); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9<sup>th</sup> Cir. 1984). Most significantly, the court in *Tongatapu* stated that once DOL certifies the alien employment certification:

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 (9<sup>th</sup> 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*, 736 F. 2d at 1309. Notably, while the court specifically cited section 204(b) of the Act, the court did not suggest that legacy INS was bound to have arranged a face-to-face consultation with DOL prior to denying the petition.

Next, counsel asserts that *Castaneda-Gonzalez v. INS*, 564 F. 2d 417, 428 n.25 (DC Cir. 1977) holds that CIS is precluded from revoking an alien employment certification “unless it is shown that the misrepresentation was willful as well as material.” Counsel asserts that there was no misrepresentation on the alien employment certification because the beneficiary had the equivalent of a Ph.D. when the alien employment certification was filed with DOL.

*Castaneda-Gonzalez v. INS*, 564 F. 2d at 417, however, deals with the deportation of a nonimmigrant who entered the United States based on a certification from DOL. In this matter, contrary to counsel’s assumption, the director did not invalidate the alien employment certification. Rather, the director denied the Form I-140 petition because the beneficiary did not meet the job qualifications as of the date of filing.

The court in *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1, 5-6 (1st Cir. 1981), makes this distinction eloquently. Specifically, the court in *Stewart Infra-Red Commissary* noted that *Castaneda-Gonzalez* did not specifically state that DOL’s function was to evaluate the alien’s job qualifications. The court continued:

It is important to understand that in *Castaneda-Gonzalez* INS was not passing upon an application for visa preference status. Instead, INS was seeking to deport an alien for entering the United States to perform labor without possession of a labor certification. Since the clear language of section 212(a)(14) vests sole authority in the Secretary of Labor to issue a labor certification and since an alien to whom such a certification has been issued cannot be excluded or deported under that particular section, the court in that case was on firm statutory ground in holding that INS could not reevaluate the alien’s qualifications for the certification. *By contrast, this case involves the grant or denial of visa preference status, authority for which is equally clearly vested in INS under sections 203(a) and 204(b).* The *Castaneda-Gonzalez* court itself recognized that the visa preference problem is “an entirely different legal issue” from that of exclusion and deportation under 8 U.S.C. s 1182. 564 F.2d at 428-29. [Footnote omitted.] Indeed far from disputing the authority of INS to determine an alien's qualifications in the context of a petition for visa preference status, the court explicitly acknowledged “the authority of the numerous cases cited by the Service for the proposition that (INS) may deny ... preference requests without reference to the Secretary of Labor because (it) determines that the applicant alien does not qualify for the preference category relied on.” 564 F.2d at 428 (footnote omitted).

*Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d at 5-6. (Emphasis added.)

Ultimately, federal circuit courts have upheld our authority, without formally meeting with DOL, to review the alien's eligibility for the classification sought *and* the job offered.

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14). *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) 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.

\* \* \*

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

*Madany v. Smith*, 696 F.2d at 1012-1013 (D.C. Cir. 1983).

Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit 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.

*K.R.K. Irvine, Inc. v. Landon*, 699 F.2d at 1008. 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.) *Id.* at 1009. See also *Tongatapu Woodcraft Hawaii, Ltd.*, 736 F. 2d at 1309 (quoted above).

The court in *Hoosier Care Inc. v. Chertoff*, 482 F. 3d 987 (7<sup>th</sup> Cir. 2007) cites both *K.R.K. Irvine*, 688 F. 2d at 1006, and *Tongatapu*, 736 F. 2d at 1305, and does not challenge their holdings. *Hoosier*, 482 F. 3d at 990-91. Specifically, *Hoosier* involved facts where CIS questioned the alien's eligibility for the job because while the alien had the required *level* of education, the education was wholly unrelated to the position. The court in *Hoosier* acknowledges that CIS has the responsibility to determine "if the alien is qualified for the job," but finds that this inquiry is different "from whether the qualifications set by the employer are proper, which is the responsibility of the Department of Labor." We are not usurping the responsibility of the Department of Labor in this matter. **Specifically, we are not questioning the certified job requirements. Rather, we are upholding the director's finding that the petitioner did not possess the required education as of the priority date in this matter.** Moreover, the court in *Hoosier* did not suggest that CIS was required to engage in a face-to-face consultation with DOL in every case where the alien does not meet the clear and unambiguous job requirements certified by DOL.

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

Block 14:

Education: Ph.D. in Special Education

Training: Two years as a student teacher

Experience: One year in the job offered

Block 15: Blank

Moreover, 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.

As noted by counsel, the original application for alien employment certification only required a Master's degree in Special Education. DOL accepted an amendment to Form ETA 750A on February 14, 2002, requiring a Ph.D. rather than a Master's degree. For the reasons discussed below, it would appear that this amendment was initiated after the Illinois Department of Employment Security (IDES) required the petitioner to re-advertise the position as requiring a Ph.D. Regardless, we must look at the educational requirements actually certified rather than the requirements initially submitted. Thus, the job as certified by DOL requires a Ph.D. Nowhere on the form, including Box 15, suggests that the petitioner would accept the equivalent of a Ph.D. As stated above, the regulation at 8 C.F.R. § 204.5(k)(2) expressly states that if a doctoral degree is customarily required by the specialty, as would presumably be apparent from the requirement of such a degree on the alien employment certification, then the alien must have a United States Ph.D. or a foreign equivalent degree. In this matter, the record contains even more evidence that a doctoral degree is customarily required as the 2002 job advertisements submitted all indicate that a Ph.D. is required. Counsel explains that these new advertisements were mandated by IDES. If a doctoral degree is customarily required, the beneficiary must possess that degree as of the priority date. The

regulation at 8 C.F.R. § 204.5(k)(2) does not suggest that a combination of education and experience can be substituted for the actual Ph.D.

On the Form ETA 750B, signed by the beneficiary on November 4, 1999, the beneficiary provided the following information:

Name and address of Schools, Colleges and Universities Attended (Include trade or vocational training facilities.)	Field of Study	From Month	Year	To Month	Year	Degrees or Certificates Received
Virginia Polytech Institute Blacksburg, Virginia	Special Education	Aug.	1994	July	1999	Ph.D. Special Ed. Administration

Initially, the petitioner submitted the beneficiary's transcript from Virginia Polytech revealing that the beneficiary defended her dissertation in the spring semester of 2001 and received her Ph.D. on May 12, 2001. The beneficiary received a "Certificate of Advanced Graduate Studies" from Virginia Polytechnic Institute on May 11, 2001 and her Master of Arts degree from the University of Toronto on November 24, 1994. The record contains a letter from Virginia Polytech indicating that the beneficiary left Virginia Polytech in August 1997 having completed her coursework, passed her examples and completed her prospectus for her dissertation. In January 2001, the beneficiary came back to Virginia Polytech, presented and defended her dissertation and received her diploma in May 2001.

We acknowledge the submission of an evaluation of the beneficiary's credentials from New York University concluding that the beneficiary had the equivalent of Ph.D. as of November 24, 1999 based on her Master's degree and over five years of experience. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The ETA 750A does not suggest that the equivalent of a Ph.D. degree would be acceptable. All of the advertisements submitted indicate that a Ph.D. in Special Education is required for the position. A final draft of one's dissertation is an integral part of obtaining a Ph.D. The beneficiary did not complete the writing of her dissertation and receive her degree until after the priority date. As such, she did not meet the requirements of the job offer as of the priority date. This finding is consistent with *Matter of Katigbak*, 14 I&N Dec. at 49 and *Matter of Wing's Tea House*, 16 I&N Dec. at 159.

On appeal, counsel asserts that *Matter of Katigbak*, 14 I&N Dec. at 49 is distinguishable. Counsel states:

In *Matter of Katigbak*, 14 I&N Dec. 45, the alien did not have the academic credits or experience equivalent at the time of filing. Here the alien did have a MA or the equivalent of a PhD.

Counsel is not persuasive. *Matter of Katigbak*, 14 I&N Dec. at 49 is precisely on point. In that matter, the alien was relying on education credits obtained after the date of filing. In this matter, the beneficiary did not complete her dissertation, an integral part of obtaining a Ph.D., until after the priority date. The beneficiary did not even return to present and defend her dissertation until January 2001, also after the priority date. Thus, the beneficiary did not have the necessary degree as of the priority date.

In response to our July 25, 2008 notice, counsel asserts that the beneficiary was qualified for the job as of the priority date because on that date, the educational requirement was only a Master's degree. According to counsel, the amendment in 2002 "represented a 'fundamental change' in the job offered because it changed the minimal educational qualification." Counsel notes that in *Century Wilshire Hotel*, 2007-INA-00022, 6 (BALCA 2007), the Board of Alien Labor Certification Appeals (BALCA) "affirmed a denial of an application where the Petitioner has sought to submit amendments to the application which operated 'a fundamental change in the job requirements' after the application had been denied." Counsel asserts that no legal authority addresses the issue of eligibility as of the priority date where there has been a "fundamental change in the job requirements."

Counsel cites several authorities for the proposition that DOL sets the job requirements, a proposition that it is not in contention. Counsel then asserts that because DOL can set the job requirements, it can change them while the Form ETA 750 is pending. Counsel asserts that holding the beneficiary to the amended job requirements as of the initial filing date would essentially be rewriting the initial job requirements.

DOL, however, did not write the initial job requirements, the petitioner did. Upon review, those requirements were found by IDHS to be incorrect. DOL only certified the amended requirements. The petitioner, upon learning that a Master's degree educational requirement would not support an alien employment certification for the position being certified, could have filed a new Form ETA 750A and obtained a new priority date. Instead, it chose to continue with its current filing. The BALCA case cited by counsel is not persuasive. In that situation, BALCA declined to accept amendments. In this matter, DOL did accept the amended Form ETA 750A. The job requirements DOL certified are the job requirements that are binding upon us. To hold otherwise would be to allow employers to secure priority dates for currently unqualified aliens by using inadequate job requirements that will need to be amended prior to approval, by which time the alien may have acquired the necessary job requirements.

We find that the reasoning behind *Matter of Katigbak*, 14 I&N Dec. at 49 is widely applicable. That decision provides:

If the petition is approved, he has established a priority date for visa number assignment as of the date that petition was filed. A petition may not be approved for a profession for which the beneficiary is not qualified at the time of its filing. The beneficiary cannot expect to qualify subsequently by taking additional courses and then still claim a priority date as of the date the petition was filed, a date on which he was not qualified.

Section 204 of the Act requires the filing of a visa petition for classification under section 203(a)(3). The latter section states, in pertinent part: "Visas shall next be made available to *qualified immigrants* who *are members* of the professions." (Emphasis added.) It is clear that it was the intent of Congress that an alien be a recognized and fully qualified member of the professions at the time the petition is filed. Congress did not intend that a petition that was properly denied because the beneficiary was not at that time qualified be subsequently approved at a future date when the beneficiary may become qualified under a new set of facts. To do otherwise would make a farce of the preference system and priorities set up by statute and regulation.

*Id.* The Regional Commissioner continued this reasoning in *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Regl. Commr. 1977). That decision reemphasizes the importance of not obtaining a priority date prior to being eligible based on future experience.

Beyond meeting the job requirements on the ETA 750B, the beneficiary was not eligible for the classification sought as of the priority date. As stated above, if a doctoral degree is customarily required, the beneficiary must possess that degree as of the priority date. 8 C.F.R. § 204.5(k)(2). The regulation at 8 C.F.R. § 204.5(k)(2) does not suggest that a combination of education and experience can be substituted for the actual Ph.D. It is clear that the petitioner had to amend the ETA 750A and recruit a second time because IDES determined that the job being offered customarily requires a doctoral degree. Thus, according to the regulation at 8 C.F.R. § 204.5(k)(2), the beneficiary was required to have that degree as of the priority date and did not.

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.