

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

PUBLIC COPY



**U.S. Citizenship
and Immigration
Services**

B5

AUG 03 2009

File: [REDACTED]
LIN 06 203 50074

Office: NEBRASKA SERVICE CENTER

Date:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting 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 software consulting business. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to aliens of exceptional ability and members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL) accompanied the petition. The director determined that the job offered did not require a member of the professions holding an advanced degree.

On appeal, counsel asserts that the primary degree requirement for the position is a master's degree, though the labor certification does state that a bachelor's degree with four years of experience in the proffered position would also be sufficient. 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. Moreover, contrary to counsel's assertions, adjudication of a Form I-140 petition requires a determination of whether both the beneficiary and the position meet the requirements of the classification sought. In the instant case, U.S. Citizenship and Immigration Services (USCIS) must look to the minimum requirements as stated on the approved labor certification application to determine whether the position qualifies for the second preference, advanced degree classification. The petitioner has indicated that it is willing to fill the position with an individual who holds less than a masters degree or equivalent, so the position cannot be considered as a second preference.

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.)

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

In this matter, Part H, line 4, of the labor certification reflects that a master's degree in computer science is the minimum level of education required. Line 7 states that a master's degree in management information systems would be acceptable in the alternative. Line 6 reflects that the individual must have two years of experience in the proffered position. Line 8 states that a combination of education and experience would also be acceptable in the alternative and states that an individual could instead have a bachelor's degree and four years of experience. Line 9 reflects that a foreign educational equivalent is acceptable.

USCIS 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). USCIS 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 USCIS 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). USCIS'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). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

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

[A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree followed by at least five years of progressive

experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate degree or a foreign equivalent degree.

Thus, where experience is not a consideration, the minimum education is a U.S. degree above that of a baccalaureate of the foreign equivalent. The petitioner indicated that only a bachelor's degree in computer science or management information systems and four years of experience as a software engineer was required. Thus, the position does not require a member of the professions holding an advanced degree.

On appeal, counsel asserts that the beneficiary possesses a master's degree in management information systems and over two years of experience in the proffered position. The AAO notes that the beneficiary's diploma from the University of Texas in Dallas dated December 14, 2002 reflects that the beneficiary instead received a master's degree in management and administrative services, not in computer science or management information systems as required by the labor certification. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The AAO also notes that the petitioner submitted a letter from the USDATA Corporation to document the beneficiary's prior work experience.

Letter from [REDACTED], Richardson, Texas, dated July 20, 2005;
Position title: customer support engineer;
Dates of employment: "from August 1998 to November 2000;"
Description of duties: had "the responsibility for providing technical support to users for the company's FactoryLink software product."

The AAO finds the letter to lack the title of [REDACTED] who signed the letter. Further, he states within the letter that he and the beneficiary "worked together." It is not clear whether he served as her supervisor or not. The letter also states that the beneficiary worked as a customer support engineer and not as a software engineer as required by the labor certification. Thus, the letter fails to document accurately that the beneficiary had the full two years of required experience as a software engineer as required by 8 C.F.R. § 204.5(l)(3)(ii)(A). Therefore, the letter is insufficient evidence and not acceptable to document that the beneficiary has the qualifying experience as required by the proffered position.

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.