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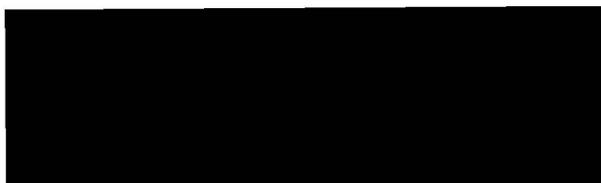
U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529-2090



U.S. Citizenship
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Services

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FILE: [REDACTED]
LIN 08 001 50713

Office: NEBRASKA SERVICE CENTER Date: FEB 02 2009

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.

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 or reopen, 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 computer software and systems firm. It seeks to employ the beneficiary permanently in the United States as a project manager. The petition was accompanied by an approved ETA Form 9089 Alien Employment Certification from the Department of Labor. The central issue in this proceeding involves the classification sought. On Part 2 of the Form I-140 petition, the petitioner checked box “d,” indicating that it seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree or an alien of exceptional ability. The director determined that the petitioner had not established that the job requires a member of the professions holding an advanced degree or an alien of exceptional ability pursuant to 8 C.F.R. § 204.5(k)(4).

On appeal, counsel asserts that the petitioner filed an “amended I-140 petition” seeking to classify the beneficiary under a lesser classification pursuant to section 203(b)(3) of the Act. The “amended” petition, however, was, in fact, a new petition with fee, assigned the receipt number SRC-08-025-53674. We note that this petition was approved by the director, Texas Service Center, on November 21, 2008. As the new petition was based on the same ETA Form 9089, the beneficiary retains the same priority date as he would have under the petition before us. For the reasons discussed below, the appeal will be dismissed.

The Form I-140, Immigrant Petition for Alien Worker, was filed concurrently with the beneficiary’s Form I-485, Application to Register Permanent Residence or Adjust Status, on August 16, 2007. The petitioner checked box “d” under Part 2 of the Form I-140 petition requesting classification as a member of the professions holding an advanced degree or an alien of exceptional ability. The petitioner also signed the Form I-140 under penalty of perjury, certifying that “this petition and the evidence submitted with it are all true and correct.”

The burden is on the petitioner to select the appropriate classification rather than to rely on the director to infer or second-guess the petitioner’s intended classification or consider subsequent “amendments.” As discussed, the Form I-140 petition was clearly marked under Part 2 as a petition filed for classification as a member of the professions holding an advanced degree or alien of exceptional ability. The petitioner signed the Form I-140 under penalty of perjury, attesting that the information on the form was correct. As the petition was unaccompanied by instructions from counsel or the petitioner specifying otherwise, the director properly adjudicated the petition pursuant to section 203(b)(2) of the Act. A post-filing alteration of the requested visa classification constitutes a material change. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to U.S. Citizenship and Immigration Services (USCIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Comm’r. 1998). In addition, the Ninth Circuit has determined that once USCIS concludes that an alien is not eligible for the specifically requested classification, the agency is not required to consider, *sua sponte*, whether the alien is eligible for an alternate classification. *Brazil Quality Stones, Inc., v. Chertoff*, Slip Copy, 2008 WL 2743927 (9th Cir. July 10, 2008).

Furthermore, USCIS is statutorily prohibited from providing a petitioner with multiple adjudications for a single petition with a single fee. The initial filing fee for the Form I-140 covered the cost of the director's adjudication of the I-140 petition. Pursuant to section 286(m) of the Act, 8 U.S.C. § 1356, USCIS is required to recover the full cost of adjudication. In addition to the statutory requirement, Office of Management and Budget (OMB) Circular A-25 requires that USCIS recover all direct and indirect costs of providing a good, resource, or service.¹ If the petitioner now seeks to classify the beneficiary as a professional or skilled worker pursuant to section 203(b)(3) of the Act, then it must file a separate Form I-140 petition requesting the new classification, as it has already done. On appeal and in response to the AAO's motion, counsel has cited no statute, regulation, or standing precedent that permits a petitioner to change the classification of a petition once a decision has been rendered by the director.

The current regulation at 8 C.F.R. § 103.2(b)(8)(i) provides in pertinent part: "If the record evidence establishes ineligibility, the application or petition will be denied on that basis." Further, 8 C.F.R. § 103.2(b)(8)(ii) provides in pertinent part: "If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility"

Thus, the director is not required to issue a request for additional evidence or a notice of intent to deny in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the regulation at 8 C.F.R. § 103.2(b)(8) does not require solicitation of further documentation. As the director correctly adjudicated the petition under section 203(b)(2) of the Act, we will only consider on appeal whether the director correctly denied eligibility under that classification.

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.

¹ See <http://www.whitehouse.gov/omb/circulars/a025/a025.html>, accessed January 29, 2009 and incorporated into the record of proceedings.

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'r. 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.

In this matter, Part H, line 4, of the labor certification reflects that a bachelor’s degree in computer science or a related field is the minimum level of education required. Line 6 reflects that 60 months of experience are also required. Line 8, however, reflects that there is a combination of education or experience that is acceptable in the alternative. Specifically, the petitioner indicated that it would “accept 2 yrs exp for each yr missing towards 4-yr Bachelor’s.” Line 9 reflects that a foreign educational equivalent is acceptable.

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.

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). Thus, even where experience is considered towards an advanced degree, the alien must have and the job must require a U.S. baccalaureate degree or a foreign equivalent degree. As the petitioner was willing to accept experience in lieu of a baccalaureate, the job did not require a member of the professions holding an advanced degree.

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 sustained that burden.

Order: The appeal is dismissed.