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U.S. Citizenship
and Immigration
Services

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FILE:

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Office: NEBRASKA SERVICE CENTER

Date: FEB 23 2009

IN RE:

Petitioner:

Beneficiary:

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 software developer and manufacturer. It seeks to employ the beneficiary permanently in the United States as an Application Solution Manager, Occupational Code 15-1031, pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, a Form ETA 750,¹ Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The certified position, while characterized by the petitioner as "Quality Project Lead" was listed by DOL as Database Administrator, Occupational Code 15-1061. Upon reviewing the petition, the director determined that the beneficiary did not have the minimum five years of experience required as of the priority date, July 25, 2002.

On appeal, counsel does not contest the director's conclusion that the beneficiary did not have the necessary experience as of the priority date. Rather, counsel asserts that the petitioner need only demonstrate that the beneficiary had the necessary experience as of the date the Form ETA 750A was amended to require five years of experience. For the reasons discussed below, we concur with the director that the beneficiary must have been qualified for the job ultimately certified as of the priority date in this matter.

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). The regulation further states: "A United States baccalaureate degree or a foreign equivalent 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 or a foreign equivalent degree." *Id.*

The beneficiary possesses a U.S. Master of Science in Information Technology Management from Creighton University. Thus, the beneficiary qualifies as a member of the professions holding an advanced degree. The sole issue is whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

As noted above, the Form ETA 750 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

¹ After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

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 a specific immigrant classification or even the job offered.

The Department of Labor'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 in [the labor certification], nor does its issuance mandate approval of a visa petition for preference status. The purpose of a labor certification is to show compliance with section 212(a)(5).

Matter of Wing's Tea House, 16 I&N Dec. 158, 160 (Reg'l. Comm'r. 1977).

This division of responsibility has been recognized by federal circuit courts. See *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983).

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (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 1006, 1008 (9th Cir. 1983). 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)(5) 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. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "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.

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 alien employment certification, as amended, reflects the following requirements:

Block 14:

Education: Master's Degree or foreign equivalent

Field of Study: Information Technology Management, Management of Information Systems or related field.

Experience: "5" years in the job offered or related occupation

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* 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. *See 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 alien employment certification application form. *See id.* at 834. 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 priority date in this matter is the date the Form ETA 750 was accepted for processing by any office within the employment system of DOL. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on July 25, 2002. Thus, the priority date in this matter is July 25, 2002, and not the date that the Form ETA 750 was subsequently amended.

It is well established that a petitioner must establish the beneficiary's eligibility as of the priority date. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971). The Regional Commissioner explained:

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.

Matter of Katigbak, 14 I&N Dec. at 49.

The Regional Commissioner continued this reasoning in *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Reg'l. Comm'r. 1977), finding that the beneficiary must have the required experience as of the priority date.

Regardless of when the petitioner amended the Form ETA 750, the priority date in this matter was established on July 25, 2002. 8 C.F.R. § 204.5(d). According to the plain language in *Matter of Katigbak*, 14 I&N Dec. at 49 and *Matter of Wing's Tea House*, 16 I&N Dec. at 160, the beneficiary must be qualified for the job certified as of the priority date.

Counsel does not contest that the beneficiary did not meet the job requirements as of the priority date in this matter. Counsel's assertion that the beneficiary should only be required to meet the job requirements as of the date the Form ETA 750 was amended is not persuasive for the reasons discussed above.

Finally, as stated above, the petitioner does not appear to be offering the beneficiary the job certified by DOL, database administrator, Occupational Code 15-1061. The alien employment certification is only valid for the particular job opportunity and for the area of intended employment stated on the alien employment certification. 20 C.F.R. § 656.30(c)(2). While not a basis of the director's decision, 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).

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.

ORDER: *The appeal is dismissed.*