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U.S. Citizenship
and Immigration
Services

B5



File: SRC 08 198 51124 Office: TEXAS SERVICE CENTER

Date: JAN 09 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)

IN 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, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on certification pursuant to 8 C.F.R. § 103.4. The director's decision will be withdrawn and the petition will be approved.

The petitioner is a hospital. It seeks to employ the beneficiary permanently in the United States as an interventional radiologist 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, an ETA Form 9089 Application for Alien Employment Certification (ETA Form 9089) 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 alien employment certification. Specifically, the director determined that the beneficiary did not possess a United States "M.D." or foreign educational equivalent.

On appeal, counsel submits a cover letter and two new evaluations of the beneficiary's credentials. For the reasons discussed below, we find that the beneficiary meets the requirements of the alien employment certification.

At the outset, it must be emphasized that the issue is not whether the beneficiary qualifies as a physician, or his eligibility to practice medicine in the United States. The beneficiary is currently employed as an interventional radiologist at a hospital in Oklahoma, and he possesses a license issued by the Oklahoma State Board of Medical Licensure, valid until August 1, 2009. The sole issue is whether the petitioner has demonstrated that the beneficiary qualifies for immigrant classification as an advanced degree professional pursuant to section 203(b)(2) of the Act, and the implementing U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 204.5(k)(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. An advanced degree is defined in the pertinent regulation as "any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate." 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 foreign five-year Bachelor of Medicine & Bachelor of Surgery (MBBS) from the University of Poona in India. Thus, the issue is whether that degree satisfies the job requirements set forth on the alien employment certification.

As noted above, the ETA Form 9089 in this matter is certified by DOL. Thus, 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:

(a) Under section 212(a)(5)(A) of the Immigration and Nationality Act (INA or Act) (8 U.S.C. 1182(a)(5)(A)), certain aliens may not obtain immigrant visas 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 Secretary of Homeland Security 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 a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts.

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) [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

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 (1991), effective as though that paragraph had not been enacted.

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)[(5)]. 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)[5] determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). See also *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984).

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. See *N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit).

When determining whether a beneficiary is eligible for a preference immigrant visa, 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 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. 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.

In this case, the petitioner stated in Part H, section 4-A of the DOL ETA Form 9089 that the educational requirements for the occupation are an "M.D." The DOL regulations at 20 C.F.R. § 656.17(h)(1) state that the job requirements "must be those normally required for the occupation." The abbreviation "M.D." stands for "Doctor of Medicine." Webster's New College Dictionary 1324 (3rd ed. 2008). The instructions for the ETA Form 9089 specifically state that an "M.D." is one of the options that would fall under "other" degrees. In the alternative, the petitioner indicated in part H, section 9 of the ETA Form 9089 that it would accept the foreign educational equivalent to a U.S. medical degree.

As stated above, the beneficiary possesses an MBBS from India. In response to the director's request for additional evidence, the petitioner submitted a credentials evaluation report from [REDACTED] of Global Credential Evaluators. The evaluation concludes that the beneficiary completed a first professional degree in medicine and Ph.D. in Radiodiagnosis and Radiology through completion of his MBBS from the University of Poona and a Doctor of Medicine degree from Gujarat University. The record does not contain an academic record of the beneficiary completing any education at Gujarat University. [REDACTED] claims membership in the American Association of Collegiate Registrars and Admissions Officers (AACRAO).

On appeal, the petitioner submits new evaluations from [REDACTED] of the Foundation for International Services, Inc. and [REDACTED] of Silvergate Evaluations, Inc. Both evaluations equate the beneficiary's education to a U.S. Doctor of Medicine degree. [REDACTED] indicates that she relied on the P.I.E.R. Workshop Report on South Asia, a publication prepared by AACRAO.

We have reviewed the Electronic Database for Global Education (EDGE) created by AACRAO. According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." AACRAO, <http://www.aacrao.org/about/> (last accessed January 8, 2008) (copy incorporated into the record of proceeding). Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." *Id.* According to the login page, EDGE is "a web-based resource for the evaluation of foreign educational credentials" that is continually updated and revised by staff and members of AACRAO. Dale E. Gough, Director of International Education Services, "AACRAO EDGE Login," <http://aacraoedge.aacrao.org/index.php> (last accessed January 8, 2008) (copy incorporated into the record of proceeding).

Authors for EDGE are not merely expressing their personal opinions. Rather, authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.² If placement recommendations are included the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12.

In the section related to the Indian educational system, EDGE provides that an MBBS from India "represents the attainment of a level of education comparable to a first professional degree in medicine in the United States."³ A first professional degree within the United States includes a

² See "An Author's Guide to Creating AACRAO International Publications" 5-6 (First ed. 2005), available for download at www.aacrao.org/publications/guide_to_creating_international_publications.pdf.

³ See placement recommendation for an MBBS from Pakistan in EDGE, accessed on January 8, 2009, copy incorporated into the record of proceeding.

Doctor of Medicine (M.D.).⁴ This peer-reviewed opinion supports a conclusion that the beneficiary's education in this matter is equivalent to a medical degree from a regionally accredited institution in the United States.

It is noted that in order to obtain permanent licensure as a physician within the state of Oklahoma, foreign medical graduates (FMGs) must complete two years of postgraduate training in the United States that has been approved by the Accreditation Council for Graduate Medical Education (ACGME), or approved postgraduate training in Canada, the United Kingdom or Ireland, whereas graduates of accredited U.S. medical colleges need only complete one year of such post-graduate training. See Okla. Admin. Code Title 435, Chapter 10, Subchapter 4 (2008), Application and Examination Procedures for Licensure as Physician and Surgeons. However, this additional training in Oklahoma is solely in the form of practical or clinical training, such as a residency or fellowship.⁵ There is no requirement that an FMG complete any additional education for Oklahoma licensure. Accordingly, the level of education required for issuance of an MBBS from India should be deemed to be the equivalent of that required for a United States M.D.

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 sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

ORDER: The petition is approved.

⁴ See <http://www.ed.gov/about/offices/list/ous/international/usnei/us/edlite-structure-us.html>, accessed on January 8, 2009, copy incorporated into the record of proceeding.

⁵ See http://www.okmedicalboard.org/miscFunction.php?filename=MD_App_July_2008.pdf, copy incorporated into the record of proceeding.