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



U.S. Citizenship
and Immigration
Services

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FILE:

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Office: NEBRASKA SERVICE CENTER

Date: MAY 26 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 sustained; the petition will be approved.

The petitioner is a dental services provider. It seeks to employ the beneficiary permanently in the United States as a dentist 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, a Form ETA 750 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 inquires as to why a notice of intent to deny was not issued prior to the denial. The regulation at 8 C.F.R. § 103.2(b)(8) provides that the director may deny a petition based on evidence of ineligibility. In this matter, the director determined that the beneficiary was statutorily ineligible since the job offered was not an advanced degree professional position. Significantly, the plain language of the regulation at 8 C.F.R. § 204.5(k)(4) provides the director with the authority to evaluate whether the job itself requires a member of the professions holding an advanced degree. Nevertheless, while the director's decision is understandable given the poor wording of the alien employment certification, the director failed to consider all of the job requirements, including that of a license from the Dental Board of California.

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 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: "Bachelor or foreign equ*"
Major Field of Study: Dentistry

Experience: 0 years in job offered or related occupation.

Block 15: Valid license to practice dentistry issued by the California State Board of Dental Examiners.

U.S. Citizenship and Immigration Services (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 [alien employment 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.

On appeal, counsel asserts that the foreign degree of a Bachelor of Dentistry or Bachelor of Dental Science is an advanced degree in dentistry, as recognized by the Dental Board of California and, in prior cases, USCIS. Counsel submits several evaluations all equating the beneficiary's degree to a U.S. DDS degree and Federal Register materials listing dentists as requiring a first professional degree.

The petitioner did not indicate that it required a U.S. DDS degree or its foreign equivalent, which the beneficiary has, but specified that the minimum was a Bachelor of Dentistry or its foreign equivalent. Were the educational requirements the only relevant information, we would concur with the director. The petitioner, however, included an asterisk after the educational requirement and expanded on its requirements in Box 15, where it stated the job required a valid license to practice dentistry issued by the California State Board of Dental Examiners (actually known as the Dental Board of California).

Thus, if the Dental Board of California requires a U.S. DDS degree or its foreign equivalent then, by extension, the petitioner is also requiring such a degree. According to information posted at www.cda.org/popup/International_Dental_Graduates (accessed March 7, 2007 and incorporated into the record of proceedings), the Dental Board of California normally requires a U.S. DDS degree but temporarily offered a pathway to licensure for graduates of foreign dental schools who pass a restorative technique (RT) exam without additional education.

While the alien employment certification would have been more persuasive if the petitioner had expressly required a U.S. DDS degree or its foreign equivalent, the inclusion of the requirement for a license from the Dental Board of California reveals that such education was ultimately required, albeit indirectly.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden.

ORDER: The decision of the director is withdrawn. The appeal is sustained and the petition is approved.