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FILE:

SRC 07 800 20363

Office: TEXAS SERVICE CENTER

Date:

NOV 19 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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director for further consideration and entry of a new decision.

The petitioner is an Internet Application Service Provider. 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). As required by statute, the petition is accompanied by Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL).¹

The director determined that the petitioner had not established that the beneficiary had the necessary one year of experience, that the job required as listed on the labor certification. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's October 21, 2008 denial, the issue in this case is whether or not the petitioner has established that the beneficiary met the one year of experience requirement of the labor certification at the time of filing the Form ETA 750.

On appeal, counsel submits a brief, previously submitted documentation, and additional letters from the beneficiary's former employers, describing the beneficiary's experience.

¹ This case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 CFR §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to U.S. Citizenship and Immigration Services (USCIS) based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (to be codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

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)(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.

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

As noted above, the 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).

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. Askkenazy Property Management Corp.* 817 F. 2d 74, 75 (9th Cir. 1987)

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

(administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

On appeal, counsel states:

The petitioner firmly maintains that the letters, the beneficiary's transcript, and the professional certification from Sun Microsystems were more than sufficient to establish the beneficiary's qualifications to show that she possessed the required one year of experience in the job offered or one year of experience in software (JAVA) development. However, assuming for the sake [sic] of argument that those previously submitted materials were not sufficient, petitioner submits the following additional materials for consideration in support of its petition:

- A letter from [REDACTED] former software manager at Tality Corporation, who directly managed the beneficiary on his software development team. Exhibit 5. [REDACTED] letter outlines the beneficiary's specific experience at Tality, where she performed design, development, and testing of software on real-time embedded processors using technologies such as C, C++, Java, XML, and Test Track Pro.
- The beneficiary's transcript from her Master of Computer Science program at the University of Massachusetts. Exhibit 6. As part of this program, the beneficiary acquired theoretical and practical knowledge of a variety of software development technologies and languages. Specifically, the beneficiary took two classes that spanned one full year: Internet and Web Systems I and II. In the Internet and Web Systems I and II graduate class, the beneficiary was involved in multiple projects where she acquired the theoretical and practical experience using XML, XML Schema, JAVA, J2EE, EJB, WebLogic, object oriented design, analysis and testing, and other related technologies.³ See Exhibit 7 – University of Massachusetts course description for both these classes.
- A letter from [REDACTED] at Tekcats, Inc., submitted in support of an H-1B visa petition filed on the beneficiary's behalf by Tekcats for the position of programmer/analyst. Beneficiary worked for Tekcats, Inc. as a programmer analyst in valid H-1B status from April 2002 to September 2002, where she further utilized and expanded her experience with JAVA and web technologies. Exhibit 8.

³ It is noted that the course description submitted on appeal does not list XML Schema, J2EE, EJB, or WebLogic.

- A letter from [REDACTED] of Adeptis, Inc. submitted in support of an H-1B visa petition filed for the beneficiary by Adeptis for the position of Staff Consultant outlining those proposed duties. See Exhibit 9. The beneficiary worked at Adeptis in H-1B status from October 2002 to January 2004, where she continued to expand her software engineering experience, specifically JAVA and web based development.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. See 8 C.F.R. § 103.2(b)(1), (12). See also *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

The priority date is the date the ETA Form 750 was accepted for processing by DOL. See 8 C.F.R. § 204.5(d). The priority date for the instant petition is April 18, 2003.

According to 20 C.F.R. § 656.1(a), the purpose and scope of the regulations regarding labor certification are as follows:

Under § 212(a)(5)(A) of the Immigration and Nationality Act (INA) (8 U.S.C. 1182(a)(5)(A)) certain aliens may not obtain a visa 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 Attorney General 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). *Id.*

at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by [USCIS] absent fraud or 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)(14). 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)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Relying in part on *Madany*, 696 F.2d at 1008, the 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 [USCIS] under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the [USCIS'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)(14) 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 Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the

job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The [USCIS] then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The [USCIS], therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

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: Master's Degree

Major Field of Study: Comp.Sci./Eng'g/Management & Technology

Experience: 1 Yr. in the job offered of software engineer or 1 Yr in the related occupation of software (JAVA) development

Block 15: Must have: Expertise with J2EE, EJB 1.1, Java 2, Servlets, JSP, JMS, JDBC, SQL, XML, XML Schema, XSLT Web Services, Weblogic 5.1 and 7.0, Oracle database, object oriented design and analysis, UML, testing and profiling tools such as JUnit and JProbe.

Moreover, to determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the alien is, in fact, qualified for the certified job.

In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. 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).

The regulation at 8 C.F.R. § 204.5(k)(3), guiding evidentiary requirements for "aliens who are members of the professions holding advanced degrees," states the following:

Initial evidence. The petition must be accompanied by documentation showing that the alien is a professional holding an advanced degree. . . .

- (i) To show that the alien is a professional holding an advanced degree, the petition must be accompanied by:
 - (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
 - (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

(Emphasis added).

Thus, for petitioners seeking to qualify a beneficiary for the "professional holding an advanced degree" category, the petitioner must produce evidence that the beneficiary meets the "educational, training or experience, and any other requirements of the individual labor certification" as clearly directed by the plain meaning of the regulatory provision. In the instant case, the petitioner has established that the beneficiary has a U.S. Master's degree in computer science. The issue on appeal is whether the petitioner has established that the beneficiary met the experience requirements of the labor certification at the priority date.

The beneficiary set forth her credentials on Form ETA-750B and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information about work experience, the beneficiary stated she was employed by [REDACTED] as a software consultant from April 2002 through September 2002. The beneficiary described her duties as:

Environment: Java 2, Servlets, JSP, EJB, JDBC, JMS, XSLT, SQL, Winrunner. Developed and implemented automated testing for web-based shopping cart application. Designed and developed a web shopping cart application. Wrote Test plan, test cases and test procedures for the same. Built a complete automated test suite using Winrunner's TSL. Documented the test cases and test results.

The beneficiary also stated that she was employed by [REDACTED], as a staff consultant from October 2002 through January 2004. The beneficiary described her duties as:

Environment: C, Java, J2EE technologies, Weblogic, Websphere, Oracle DB server, MS-SQL server, XML, SQL language, UML, VBScript, Mercury Interactive Tools. Performed software development and testing in Java and other technologies for clients. Delivered training engagements and performed turnkey testing projects using Mercury Interactive automated tools: Turnkey performance test for public site of major online publisher. Performance tested a peoplesoft application with Oracle 11iDB server for a community hospital. Lead training classes for Mercury interactive automated tools.

In support of the beneficiary's experience, the petitioner submitted a copy of the beneficiary's certification as a SUN Certified Programmer for the JAVA 2 Platform, a copy of a certificate for LoadRunner Web 7.0 Certified Product Specialist, a letter, dated November 19, 2003, from [REDACTED], stating that the beneficiary was employed with Adeptis, Inc. as Staff Consultant since October 5, 2002, and a letter, dated October 8, 2001, from [REDACTED] stating that the beneficiary was employed with Tality since November 16, 1999 as a Senior Design Engineer.

In response to a request for evidence regarding the beneficiary's experience, the petitioner submitted a letter, dated August 8, 2008, from [REDACTED] Foliage Software Systems, stating that the beneficiary worked directly with him in the Lowell office of Tality from June 2000 to July 2001 as a Senior Design Engineer. [REDACTED] stated:

In that capacity, she performed design, development and testing of software on real-time embedded processors. In carrying out these responsibilities, she dealt with issues of operating systems, computer architecture and microprocessors among others. She performed all the phases of software development for different modules, which included design, coding and functional specifications as well as functional, unit, integration and regression testing and bug tracking. Also, as part of continuing education, she completed a course in UMass Lowell in Java and Distributed Computing Systems during her employment with Tality Corporation.

She used various tools in this position including Embedded microprocessors, Integrated Development Environment, programming languages like C, C++, Java, XML and Test Track Pro.

A letter, dated August 13, 2008, from [REDACTED] was submitted that stated that the beneficiary worked with him at Adeptis, Inc. from September 2002 to July 2003 as a staff consultant. [REDACTED] stated:

While employed at Adeptis, Inc., [the beneficiary] was involved in delivering training engagements and performing turnkey testing projects using Mercury Interactive automated tools. Her duties included analyzing performance of computer systems for clients, including web-based applications, using automated testing tools for performance, regression and functional testing; identifying bottlenecks using knowledge of computer organization, operating systems and computer architectures; isolating network and application performance issues using knowledge of networks and data communications; assist client in developing solutions to performance problems to improve computer performance; create generic, maintainable automated test scripts for users and train clients in the use of automated testing tools and standards for benchmarking and performance analysis.

During [the beneficiary's] employment at Adeptis, Inc., she gained experience in software programming languages like C, C++, Java, web technologies like IIS, Apache, HTML, XML, Javascript, Servlets, JSP, Perl, databases like SQL server and Oracle which were needed for her to perform the duties mentioned above. She also received in-depth training on complete suite of Mercury Interactive testing tools including WinRunner 7.5, QuickTest Pro 6.0, LoadRunner 7.51 and TestDirector 7.6 and provided consulting services for loadrunner, winrunner and test director.

On October 21, 2008, the director denied the petition stating that the letters provided in support of the beneficiary's experience "do not give specific detailed description of the duties performed by the beneficiary, nor are they from current or former employers, they are from former coworkers."

On appeal, the petitioner submits additional letters from officers of Tekcats, Inc. and Adeptis, Inc. that describe, in detail, the positions and work experience of the beneficiary during her time with each entity while in H1B status. Those descriptions show that the beneficiary met the one year experience requirement of the labor certification at the time of filing through her six months of employment with Tekcats, Inc. and an additional six months of employment with Adeptis, Inc.

Therefore, we find that the evidence submitted showing that the beneficiary met the one year experience requirement of the labor certification is persuasive. However, beyond the decision of the director, the record in this case lacks conclusive evidence as to whether the beneficiary meets

the special requirements of the labor certification. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

As discussed earlier, the special requirements under part 15 of the labor certification require that the beneficiary must have expertise with J2EE, EJB 1.1, Java 2, Servlets, JSP, JMS, JDBC, SQL, XML, XML Schema, XSLT Web Services, Weblogic 5.1 and 7.0, Oracle database, object oriented design and analysis, UML, testing and profiling tools such as JUnit and JProbe. In the instant case, none of the letters submitted by the beneficiary's prior employers specifically state that the beneficiary had experience in J2EE, JMS, XML Schema, XSLT Web Services, WebLogic 5.1 & 7.0, UML, JUnit, JProbe, etc.

As the letters do not specifically indicate that the beneficiary met the above requirements in her prior employment and since there are no other employment letters in the record of proceeding, the beneficiary cannot be deemed to meet the special requirements under item 15 of the labor certification. Therefore, the petitioner has not established that the beneficiary meets the special requirements of the labor certification. The AAO is remanding the visa petition to the director for further consideration and for entry of a new decision.

The director must afford the petitioner reasonable time to provide evidence relevant to the beneficiary's eligibility for this immigration benefit or any other immigration benefit. In addition, the director may request any other evidence that he deems appropriate. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn; however, the petition is currently not approvable for the reason discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the AAO for review.