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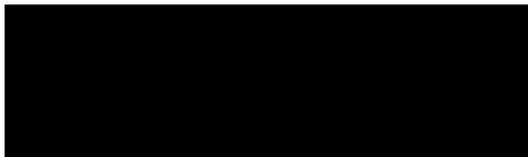
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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FILE:

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Office: NEBRASKA SERVICE CENTER Date: OCT 30 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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained; the petition will be approved.

The petitioner claims to be a supplier of medical devices. It seeks to permanently employ the beneficiary in the United States as a senior programmer/analyst. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).¹ As required by 8 C.F.R. § 204.5(k)(4), the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the Department of Labor (DOL).

As set forth in the director's November 27, 2007 denial, the primary issue in this case is whether the job offered requires an advanced degree professional.

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.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b); *see also Janka v. U.S. Dept. of Transp.*, 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

On the petition, the petitioner claimed to have been established in 1985, to have consolidated gross annual income of \$1.44 billion, and to employ 7,600 workers worldwide. The proffered wage stated on the labor certification is \$77,147.00 per year. The priority date of the petition is December 13, 2006, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

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

¹There is no evidence in the record of proceeding that the beneficiary possesses exceptional ability in the sciences, arts or business. Accordingly, consideration of the petition will be limited to whether the beneficiary is eligible for classification as a member of the professions holding an advanced degree.

²The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, which are incorporated into the regulations by 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).

States.³ In order to classify the beneficiary in this employment-based preference category, the petitioner must establish that: the labor certification requires an advanced degree professional;⁴ the beneficiary is an advanced degree professional;⁵ and the beneficiary meets the requirements of the job offered as set forth in the labor certification.⁶ The petitioner must also establish that it has the continuing ability to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence.⁷

It is important to note that the DOL's role in the employment-based immigrant visa process is limited to determining whether there are sufficient U.S. workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of similarly employed U.S. workers. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a). It is significant that none of the responsibilities assigned to DOL, nor the remaining regulations implementing these duties at 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or the job offered. Instead, the authority to make this determination rests solely with U.S. Citizenship and Immigration Services (USCIS). See *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983).

The minimum education, training, experience and skills required to perform the offered position are set forth at Part H of the labor certification. In the instant case, the labor certification states that the offered position has the following requirements:

- H.4. Education: Bachelor's degree in "Any Major"
- H.5. Training: None
- H.6. Experience in job offered: 60 months
- H.7. Acceptable alternate field of study: "Any Major"
- H.8. Acceptable alternate combination of education and experience: None

³The regulation at 8 C.F.R. § 204.5(k)(2) defines an "advanced degree" as "any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate." The regulation further states that 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." *Id.*

⁴8 C.F.R. § 204.5(k)(4).

⁵8 C.F.R. § 204.5(k)(3).

⁶8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

⁷8 C.F.R. § 204.5(g)(2).

- H.9. Foreign educational equivalent acceptable: Yes
- H.10. Acceptable experience in an alternate occupation: 60 months as a computer programmer, computer systems analyst or related occupation
- H.14. Specific skills or other requirements: the required 60 months of experience must include Oracle applications functionality, support, and development. Proficiency with Oracle version 10.7 or later and PL/SQL required

On the labor certification, signed by the beneficiary, the beneficiary represented that the highest level of education that he achieved was a bachelor of science in chemistry from Tokai University, Japan, issued in 1981.

At issue in this case is whether the job offer portion of the labor certification demonstrates that the job requires a member of the professions as required by 8 C.F.R. § 204.5(k)(4). If the labor certification does not require a professional, the petition must be denied.

The regulation at 8 C.F.R. § 204.5(k)(2), defines "profession" as:

[O]ne of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

Section 101(a)(32) of the Act states that the term "profession" "shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The offered position is not one of the occupations listed at Section 101(a)(32) of the Act. Therefore, in the instant case, the analysis of whether the offered position requires a member of the professions is based on whether a baccalaureate degree is the minimum requirement for entry into the occupation.

Although the definition of "profession" at 8 C.F.R. § 204.5(k)(2) does not explicitly state that the labor certification must require a field of study that relates to the occupation, the regulation provides that a profession is an occupation for which a baccalaureate degree is the *minimum* requirement for *entry* into the occupation. Thus, some professions may require more than a baccalaureate in an unspecified field for entry into that particular profession. In cases where the labor certification does not require a field of study related to the occupation of the offered position, USCIS is justified in considering whether the labor certification can truly be considered to require a member of the professions. We note that being a member of the professions does not entitle the alien to classification as a professional if he does not seek to continue working in that profession. *See Matter of Shah*, 17 I&N Dec. 244, 246-47 (Reg'l. Comm'r. 1977).

On the labor certification, the DOL categorized the offered position under SOC code 15-1031, Computer Software Engineers, Applications. The O*NET online database⁸ states that the occupation

⁸O*NET, located at <http://online.onetcenter.org>, is described as "the nation's primary source of

of Computer Software Engineers, Applications falls within Job Zone Four,⁹ and that 85% of individuals in this occupation hold a baccalaureate degree or higher.¹⁰

The corresponding entry in the Occupational Outlook Handbook (OOH) for SOC code 15-1031 is Computer Software Engineers.¹¹ The required education for this occupation is summarized as follows:¹²

Most employers prefer applicants who have at least a bachelor's degree and broad knowledge of, and experience with, a variety of computer systems and technologies. The usual college major for applications software engineers is computer science or software engineering. Systems software engineers often study computer science or computer information systems. Graduate degrees are preferred for some of the more complex jobs. In 2006, about 80 percent of workers had a bachelor's degree or higher. Academic programs in software engineering may offer the program as a degree option or in conjunction with computer science degrees. Because of increasing emphasis on computer security, software engineers with advanced degrees in areas such as mathematics and systems design will be sought after by software developers, government agencies, and consulting firms.

In summary, O*NET and the OOH confirm that the offered position requires at least a bachelor's degree. However, the OOH indicates that, while "computer science or software engineering" are the "usual" majors for applications software engineers, a degree in either field is not necessary for entry into the occupation.¹³

Further, it is noted that, after obtaining a bachelor of science degree in chemistry, the beneficiary accumulated extensive experience as a computer professional. The labor certification, signed by the

occupational information, providing comprehensive information on key attributes and characteristics of workers and occupations" (accessed September 26, 2009).

⁹According to O*NET, most of the occupations in Job Zone Four require a four-year bachelor's degree. <http://online.onetcenter.org/help/online/zones> (accessed September 26, 2009).

¹⁰Details Report for 15-1031.00 at <http://online.onetcenter.org/link/details/15-1031.00> (accessed September 26, 2009).

¹¹The OOH, located at <http://www.bls.gov/OCO>, is a nationally recognized source of career information published by the DOL's Bureau of Labor Statistics.

¹²<http://www.bls.gov/oco/ocos267.htm> (accessed September 26, 2009).

¹³It is noted that the director did not reference a source of information suggesting that a minimum of a baccalaureate in any field of study was not a normal requirement for the occupation.

beneficiary under penalty of perjury, states that the beneficiary has been employed as a computer professional for over 15 years. In addition, the record contains letters from the beneficiary's previous employers, which document over five years of progressively responsible experience as a computer professional. Specifically, the letters state that the beneficiary was employed as a Senior Business Systems Analyst with Mykrolis Corporation from April 2001 to January 2006; as a Business Systems Analyst with Millipore Corporation from March 2000 to March 2001; and as a Supervisor with the MIS Department of [REDACTED] from 1988 to 2000. The beneficiary's experience is consistent with the requirements of the occupation as stated in the OOH.

In light of the above, the petitioner has established that the position certified by the DOL is a profession.¹⁴

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 met that burden.

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

¹⁴On appeal, counsel asserts that the offered position is an engineering position and is therefore statutorily defined as "professional" by section 101(a)(32) of the Act. However, the profession of "computer software engineer, applications" is substantively different than that of "engineer." These professions are categorized separately in O*NET, SOC, and the OOH. According to the OOH, computer applications software engineers design, construct, and maintain computer applications software or specialized utility programs, and the occupation generally requires an individual with a degree in a computer-related field. <http://www.bls.gov/oco/ocos267.htm> (accessed September 26, 2009). Conversely, the OOH states that engineers apply principles of science and mathematics to develop solutions to technical problems, thereby providing a link between scientific discoveries and commercial applications. <http://www.bls.gov/oco/ocos027.htm> (accessed September 29, 2009). A bachelor's degree in engineering is required for almost all engineering jobs. *Id.* Accordingly, the occupation of "computer software engineers, applications" is fundamentally different from the occupation of "engineer." The use of the term "engineer" in the title of the offered position will not transform a non-engineering position into an engineering occupation.