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U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

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FILE: LIN 07 139 51850 Office: NEBRASKA SERVICE CENTER Date: **SEP 4 - 2009**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:

SELF-REPRESENTED

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 employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is the Florida Department of Financial Services. It seeks to employ the beneficiary permanently in the United States as a systems project analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, which was certified by the Department of Labor.

The director determined that the Form ETA 750 failed to demonstrate that the job requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability and, therefore, the beneficiary cannot be found qualified for classification as a member of the professions holding an advanced degree or an alien of exceptional ability. 8 C.F.R. § 204.5(k)(4). The director denied the petition accordingly.

On appeal, the petitioner states that the beneficiary works with programmers and programmer/analysts and business users to design and maintain applications for the Florida State Treasury and that his unique skill set and exceptional abilities make him invaluable to his continued employment. The petitioner asserts that the beneficiary has exceptional ability as well as being a professional with an advanced degree in computer and information science.

The record shows that the appeal is properly filed and timely. 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.

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.*

Section 203(b)(2) of the Act also includes aliens "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." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered."

Here, the Form I-140 was filed on April 13, 2007. On Part 2.d. of the Form I-140, the petitioner indicated that it was filing the petition for a member of the professions holding an advanced degree or an alien of exceptional ability.

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.

The regulation at 8 C.F.R. § 204.5(k)(4) states in pertinent part that "[t]he job offer portion of an 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 of an alien of exceptional ability."

In this case, item 14 of the job offer portion of the Form ETA 750 indicates that the minimum level of education required for the position is a Masters of Science or equivalent. No major field of study is designated. The minimum experience required is one year in the job offered or two years in a related occupation. The related occupation is stated as a program analyst position. The position's duties are set forth on item 13 of the Form ETA 750. They are continued on an addendum. The addendum also states that a "BS + 2 yrs. Exp, or equivalent exp. based on a year for year basis can sub. for reqs. education." This does not describe an advanced degree within the context of the regulation at 8 C.F.R. § 204.5(k)(2).¹ Accordingly, the job offer portion of the Form ETA 750 does not require a professional holding an advanced degree or the equivalent.

With regard to classification as an alien with exceptional ability, the regulation at 8 C.F.R. § 204.5(K)(3)(ii) provides that any three of the following may be accepted as evidence of exceptional ability;

- (1) Degree relating to area of exceptional ability;
- (2) Letter from current or former employer showing at least 10 years experience;
- (3) License to practice profession;
- (4) Person has commanded a salary or remuneration demonstrating exceptional ability;
- (5) Membership in professional association;
- (6) Recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organization.

Comparable evidence may be submitted if above categories are inapplicable. This evidence may include expert opinion letters. These criteria serve as guidelines, but evidence that a beneficiary may meet three of these criteria is not dispositive of whether the beneficiary is an alien of exceptional

¹ Additionally, while the petitioner submitted a copy of the beneficiary's master's degree, the petitioner failed to demonstrate that the beneficiary had the required one year of experience in the position offered before the priority date, or two years of experience in the related occupation before the priority date. Therefore, even if the petition would be accepted under the advanced degree category, the petitioner has not demonstrated that the beneficiary met the petition's requirements.

ability. It must also be established that the beneficiary possesses a degree of expertise significantly above that ordinarily encountered in the sciences, arts or business. Other than the petitioner's unsupported statement submitted on appeal, the AAO finds no evidence in the record that the beneficiary would qualify for a classification as an alien of exceptional ability. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Additionally, the regulation at 8 C.F.R. 204.5(k)(2)(4)(i) provides that the job offer of the individual labor certification must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability. There is no evidence in this case that the job offer described on the ETA 750 requires an alien of exceptional ability.

The evidence submitted does not establish that the Form ETA 750 requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability, and the appeal must be dismissed.

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.