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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
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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER
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Date:

FEB 02 2010

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:



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 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 dismissed.

The petitioner is a medical practice. It seeks to employ the beneficiary permanently in the United States as a medical and health services manager 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 approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the proffered job based on the certified ETA 9089 did not require a member of the professions holding an advanced degree, or alternatively, a bachelor's degree in health care management with five years of prior work experience.

On appeal, counsel asserts that the beneficiary, as a licensed medical doctor, has an U.S. advanced degree or foreign equivalent degree. Counsel states that the beneficiary has passed the U.S. Medical Licensing Examination and has received a Certificate or Licensure from the Education Commission for Foreign Medical Graduates.

The record shows that the appeal is properly filed and 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.

For the reasons discussed below, we find that the director's conclusion is supported by the plain language of the regulation at 8 C.F.R. § 204.5(k)(4), which is binding on us.

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 director specifically cited this regulation and it provides the legal basis for his ultimate conclusion.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole. The AAO notes that the I-140 adjudication is a two-prong approach. The beneficiary has to be eligible for the professional classification and also the beneficiary has to meet the terms and conditions of the labor certification. In this case, it is irrelevant that the beneficiary meets the individual qualifications for the classification sought because the labor certification does not require a master's degree or a bachelor's degree with five years of progressive work experience

In this matter, Part H, line 4, of the labor certification reflects that a bachelor's degree in healthcare management is required for the position. In Part H, line 6-A, it states that 18 months of work experience is required for the position. Part H, lines 7 and 7-A reflects that the alternate field of study of medicine is acceptable. Lines 8 and 8-A reflect that no combination of education or experience or alternate level of education is acceptable, while Line 9 reflects that a foreign educational equivalent is acceptable.

The AAO notes that the record contains copies of the job advertisements utilized by the petitioner during the labor certification process. All advertisements noted that a bachelor's degree (non-specific) with five years of work experience is required for the proffered position. Nevertheless, the certified ETA Form 9089 only reflects that eighteen months of work experience are required.¹

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

¹ Thus, there is a discrepancy between the job requirements identified during the labor certification process and the visa petition application. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." The AAO notes that it does not have jurisdiction to change the terms of the Form ETA 9089 even in cases involving errors or typographical errors. The DOL, as the issuing agency for certified Forms ETA 9089, has the authority to address any issues of incorrectly filled items on the Form ETA 9089. The AAO notes that counsel is not claiming to have made a mistake in the labor certification or claiming that the minimum requirements are greater than those stated on the ETA Form 9089.

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 [labor 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.

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.

Thus, where experience is not a consideration, the minimum education is a U.S. degree above that of a baccalaureate or the foreign equivalent. The petitioner indicated that only eighteen months of work experience was required for the proffered position. Thus, the position does not require a member of the professions holding an advanced degree.

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.

This denial is without prejudice to the filing of a new petition accompanied by a properly filled out ETA Form 9089.²

ORDER: The appeal is dismissed.

² The AAO also notes that the petitioner submitted a copy of the beneficiary’s transcript of five years of medical studies at Sindh Medical College and the University of Karachi and his receipt of a M.B.B.S degree from these two institutions. If the petitioner pursues this matter further, it should submit an academic equivalency report with regard to the beneficiary’s studies.