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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship and Immigration Services

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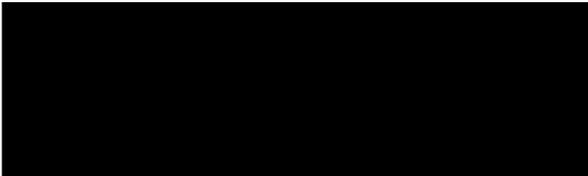
FILE: [Redacted] Office: TEXAS SERVICE CENTER

Date: MAR 04 2011

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas 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 dismissed.

The petitioner claims to be a wholesale business. It seeks to permanently employ the beneficiary as a credit analyst. On October 27, 2008, the petitioner requested 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

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition is March 9, 2008, which is the date the labor certification was accepted for processing by the DOL. See 8 C.F.R. § 204.5(d).

As set forth in the director's denial, at issue on appeal is whether the offered position requires an advanced degree professional, and whether the beneficiary is an advanced degree professional. The AAO will also consider whether the beneficiary meets the minimum requirements of the offered position as set forth in the labor certification.²

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 conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d at 145. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.³

¹ Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or aliens of exceptional ability, whose services are sought by an employer in the United States. There 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.

² 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*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

³ The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, 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).

At the outset, it is useful to discuss the role of U.S. Citizenship and Immigration Services (USCIS) and the DOL in the employment-based immigrant visa process. Section 212(a)(5)(A)(i) of the Act provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. 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).⁴ *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 INS 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:

⁴Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

[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 INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS'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 the 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 INS 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 INS, 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).

In summary, it is the DOL's responsibility to certify the terms of the labor certification, but it is the responsibility of USCIS to determine if the petition and the alien beneficiary are eligible for the classification sought.

Whether the Offered Position Requires an Advanced Degree Professional

The first issue is whether the offered position requires an advanced degree professional. On Part 2 of Form I-140, Immigrant Petition for Alien Worker, the petitioner checked box "d." By checking

this box, the petitioner designated the petition as being filed for a member of the professions holding an advanced degree.

In order to establish that the offered position qualifies for the requested immigrant classification, the job offer portion of the labor certification "must demonstrate that the job requires a professional holding an advanced degree or the equivalent." 8 C.F.R. § 204.5(k)(4). If the offered position does not require an individual with an advanced degree, the petition must be denied.

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

The key to determining whether the offered position requires an advanced degree is found on the labor certification. See 8 C.F.R. § 204.5(k)(4). The required education, training, experience and skills for the offered position are set forth at Part H of the labor certification. In the instant case, the labor certification states that the position has the following minimum requirements:

- H.4. Education: Bachelor's degree in business administration.
- H.5. Training: None required.
- H.6. Experience in the job offered: None required.
- H.7. Alternate field of study: None permitted.
- H.8. Alternate combination of education and experience: None permitted.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: None accepted.
- H.14. Specific skills or other requirements: None.

The labor certification in the instant case permits an individual to qualify for the offered position with a U.S. bachelor's degree and no experience. Therefore, the labor certification does not require an individual with an advanced degree as defined by 8 C.F.R. § 204.5(k)(2), and the petition was properly denied for this reason.

Whether the Beneficiary is an Advanced Degree Professional

The second issue is whether the beneficiary is an advanced degree professional as required by 8 C.F.R. § 204.5(k)(3). As is discussed above, 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as a U.S. degree (or foreign equivalent degree) above a baccalaureate, and also states that a U.S. bachelor's degree followed by five years of progressive experience is equivalent to a master's degree.

The record of proceeding contains the following documents pertaining to the beneficiary's education:

- Diploma and transcripts for a three-year Bachelor of Commerce degree in Business Management from the University of Bombay, India.
- Transcripts for four semesters of study towards a Master of Business Administration Degree from the National Institute of Management in Mumbai, India.

The record contains an evaluation of the beneficiary's foreign academic credentials by [REDACTED], dated March 15, 2002. The evaluation states that the beneficiary's three-year bachelor of commerce degree "is indicative that [the beneficiary] satisfied requirements substantially similar to academic studies leading to a Bachelor's Degree from an accredited institution of higher education in the United States." It is noted that the evaluation does not state that the beneficiary's bachelor of commerce degree is equivalent to a U.S. bachelor's degree from a regionally accredited institution of higher education. The evaluation also does not state the field of study for the equivalency. A bachelor degree is generally found to require four years of education, yet the evaluation does not address this fact. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). Regarding the Master of Business Administration Degree, the evaluation states that the beneficiary has "attained the equivalent of a Master of Business Administration Degree from an accredited institution of higher education in the United States." The evaluation does not provide factual support for its conclusions. The evaluation does not analyze the beneficiary's transcripts. The evaluation does not mention whether the National Institute of Management (which, according to its website at <http://site.nimonweb.com> is a distance learning institution) is recognized by India's University Grants Commission. Further, the record does not contain a Master of Business Administration diploma from the National Institute of Management, and the beneficiary's transcripts do not specifically indicate that he received a degree from the National Institute of Management. Finally, the beneficiary does not claim to have earned a master's degree on Part J of the labor certification.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). For the reasons set forth above, the AAO does not consider the evaluation to be persuasive evidence of the U.S. equivalency of the beneficiary's educational credentials, and it is concluded that the evidence in the record does not establish that the beneficiary possesses a U.S. master's degree (or foreign equivalent degree) or even a U.S. bachelor's degree (or foreign equivalent degree).⁵ It is noted that the director's denial also raised issues with the educational credentials evaluation, however the petitioner declined to submit a new evaluation of the beneficiary's credentials on appeal.

⁵ Even if the evidence in the record established that the beneficiary possessed the foreign degree equivalent of a U.S. bachelor's degree in business administration, the petitioner has not established that the beneficiary possessed, by the priority date, five years of progressively responsible post-baccalaureate experience in the specialty. 8 C.F.R. § 204.5(k)(2).

Since the evidence in the record does not establish that the beneficiary possesses a U.S. degree (or foreign equivalent degree) above a baccalaureate, or a U.S. bachelor's degree (or foreign equivalent degree) followed by five years of progressive experience, the petitioner has failed to establish that the beneficiary is an advanced degree professional, and the petition was also properly denied for this reason.

Whether the Beneficiary Meets the Requirements of the Job Offered

Beyond the decision of the director, the petitioner has also not established that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). 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 v. Smith*, 696 F.2d 1008; *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coorney*, 661 F.2d 1 (1st Cir. 1981).

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."

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]." *Id.* at 834.

Even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements.

(D. Or. Nov. 30, 2006). Thus, where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* at *7.

The required education, training, experience and skills for the offered position are set forth in detail above. The labor certification requires an individual with a bachelor's degree in business administration. As is explained above, the evidence in the record does not establish that the beneficiary possesses a U.S. bachelor's degree or foreign equivalent degree. Thus, the petitioner has not established that the beneficiary possesses the educational qualifications required to perform the proffered position. 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)).

An application or petition that fails to comply with the technical requirements of the law may be

denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043; *see also Soltane v. DOJ*, 381 F.3d at 145

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

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.