

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY**

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

35



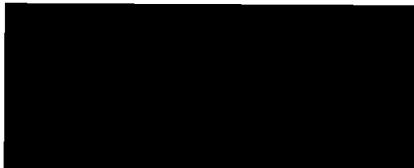
DATE: **OCT 11 2011** OFFICE: NEBRASKA SERVICE CENTER

FILE:

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:

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, 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 an educational institution. It seeks to employ the beneficiary permanently in the United States as an assistant professor pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to aliens of exceptional ability and members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, an ETA Form 9089 Application for Alien Employment Certification, which the Department of Labor (DOL) approved, accompanied the petition. The director determined that the job offered did not require a member of the professions holding an advanced degree.

For the reasons discussed below, the AAO finds 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 the AAO.

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.

(Emphasis added.) 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 cited this regulation in his decision.

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.

In this matter, Part H, lines 4 and 7, of the labor certification reflect that an all but dissertation (ABD) level of education as part of a Ph.D. program in risk management and insurance is the minimum level of education required. Line 8 reflects that no combination of education or experience is acceptable in the alternative. Line 9 reflects that a foreign educational equivalent is acceptable.

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 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.

On appeal, counsel asserts that the petitioning university should be the entity to decide the appropriate requirements for the position. Counsel further asserts that the beneficiary had completed a master's degree before entering her Ph.D. program at the University of Calgary in Canada. Counsel explains that universities in the United States recruit the best and brightest professors and that it is an industry standard to require an ABD and not a full Ph.D. when hiring. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Finally, counsel states that, if USCIS denies petitions such as this one, this decision will have a detrimental impact upon a multitude of universities.

The petitioner submitted letters from [REDACTED] and Student Affairs, and [REDACTED] asserting students enter Ph.D. programs in “some disciplines” with a master’s degree and in “others” students receive a master’s degree “along the way.” Both letters assert that “ABD” goes beyond the requirements of a master’s degree. 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’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)). Moreover, nothing in these letters suggests that Ph.D. programs in risk management and insurance always require a master’s degree for entry into the program or always award master’s degree diplomas to students before they reach the “ABD” stage.

At issue is not whether the beneficiary is an advanced degree professional, whether the job requirements are appropriate for the position or whether “ABD” students have studied longer than those who have received a master’s degree. Rather, the issue is whether the job requirements as certified by DOL establish that the job requires a “degree” above that of a baccalaureate. 8 C.F.R. § 204.5(k)(2). Thus, the beneficiary’s completion of a master’s degree prior to entry into her Ph.D. program is not decisive. As an “ABD” is a term of art that recognizes the student must still complete the dissertation process before receiving the final Ph.D. “degree,” an “ABD” is not a “degree.” Moreover, the petitioner has not established that all Ph.D. programs in risk management and insurance require the completion of a master’s degree prior to entry into that program or award master’s degree diplomas to all students before they reach the “ABD” stage. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner has not established through the evidence submitted that the listing of an “ABD” requirement on the alien employment certification reflects a job requirement of a “degree” above a baccalaureate.

The beneficiary may have completed all but her dissertation as of the priority date and, thus, may meet the requirements of the alien employment certification. The position as listed on the alien employment certification, however, did not require a professional with an advanced degree. An “ABD” is not a degree and the petitioner has not demonstrated that by requiring “ABD” the petitioner required at least a “degree” above a baccalaureate pursuant to 8 C.F.R. § 204.5(k)(2).

The petitioner indicated that only an “ABD” was required, not an advanced degree or a foreign equivalent degree. 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.

ORDER: The appeal is dismissed.