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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
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Services



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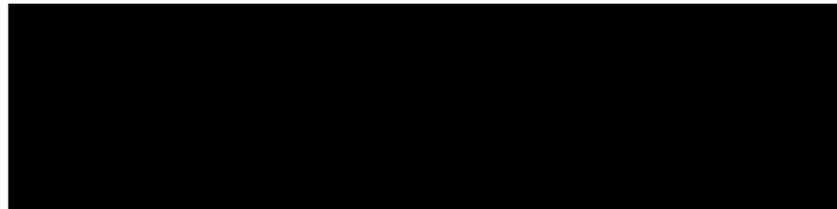
DATE: **OCT 13 2011** OFFICE: NEBRASKA SERVICE CENTER

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.

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 sustained. The petition will be approved.

The petitioner is a public university. 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). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, which the U.S. Department of Labor (DOL) approved, accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not meet the specified job requirements. Specifically, the director determined that the beneficiary did not possess the requisite education in the requisite field.

On appeal, counsel submitted a brief and additional evidence regarding the beneficiary's education. The AAO will reverse the director's decision. On May 4, 2011, the AAO requested additional evidence. The petitioner responded. For the reasons discussed below, the AAO concludes that the beneficiary possesses the requisite education in one of the requisite fields for the proffered position.

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 U.S. 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 U.S. doctorate or a foreign equivalent degree." *Id.*

The beneficiary earned a Bachelor of Science degree in electrical engineering from [REDACTED] in human resources education from the [REDACTED] in 2008. The issue is whether those credentials meet the specified job requirements.

Because the beneficiary has a U.S. advanced degree, he does qualify for preference visa classification as an advanced degree professional under section 203(b)(2) of the Act.

Qualifications for the Job Offered

Relying in part on *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983), the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

[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 DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] 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 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). *See also Matter of Wing's Tea House*, 16 I&N Dec. 160 (Acting Reg'l Comm'r 1977).

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien employment 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.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the alien employment certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine “the language of the labor certification job requirements” in order to determine what the job requires. *Id.* 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 an alien employment certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See 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 alien employment certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the alien employment certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the alien employment certification.

In this matter, Part H, lines 4 and 7, of the alien employment certification reflect that a Ph.D. degree in engineering education, engineering, or a “closely related field” and a master's degree and/or bachelor's degree in electrical engineering is the minimum level of education required. Line 6 reflects that no experience in the proffered position is 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.

As stated above, the beneficiary earned a Bachelor of Science degree in electrical engineering from [REDACTED] degree in electrical engineering from the [REDACTED] in human resources education from the [REDACTED] in 2008.

In his November 23, 2010 decision, the director concluded that the beneficiary does not meet the requirements set forth on the labor certification because the beneficiary possesses a Ph.D. degree in human resources education while the alien employment certification requires a Ph.D. in engineering education, engineering, or a closely related field.

On appeal, counsel asserted that the beneficiary's Ph.D. degree in human resources education is in a closely related field to engineering education. On May 4, 2011, the AAO issued a request for evidence (RFE) asking for information regarding how the petitioner had expressed its intent for the parameters of a closely related field to the DOL during the alien employment certification processing period. On May 13, 2011, the AAO received the petitioner's response to the RFE.

The petitioner's response demonstrated that the DOL had actually audited the underlying alien employment certification on November 6, 2009, seeking the petitioner's intent with the above aforementioned issue. In response to the DOL's audit notification, the petitioner had submitted various materials, which the petitioner includes with its submission to the AAO in response to the AAO's RFE. These materials included the petitioner's posting notices, advertisements for the proffered position, and prevailing wage documentation as well as information demonstrating the beneficiary's educational qualifications.

On appeal, the petitioner had submitted a copy of the beneficiary's dissertation entitled [REDACTED] from [REDACTED]

This letter states in pertinent part that:

Because Engineering and Technology Education is a relatively new academic field, most university faculty in the United States who teach in the field of Engineering Education do not have doctorates in Engineering Education. Instead, many of them have degrees in educational psychology, human resource development, or technology education. . . .

While there are currently only a few programs nationally that offer a Doctorate that is specifically entitled "Engineering Education" (i.e., [REDACTED]), other programs such as ours focus on engineering education through our Doctoral program in Human Resource

Education. Within this degree is an emphasis in technology education in K-12 schools and performance improvement in engineering and technical settings in corporate environments. **As such, we offer a doctorate in Human Resource Education for doctoral students who wish to specialize in the field of Engineering and Technology Education upon their graduation.**

(Emphasis in original.) The AAO finds the fact that only three universities in the United States offer Ph.D. programs in engineering education to be probative evidence that an individual may need to have a Ph.D. in a related field in order to be qualified for the proffered position. The petitioner also submitted a certificate demonstrating that the American Society for Engineering Education gave the beneficiary an award for his recent research in 2009, work that appears to build on his dissertation work.

The materials that the petitioner had submitted to the DOL in response to the audit (and to the AAO in response to the AAO's RFE) had also included an original recruitment letter dated November 13, 2009 from [REDACTED]

[REDACTED]. He specifically stated that the petitioner intended for a closely related field as listed on the alien employment certification to include human resources education. [REDACTED] further states:

[The beneficiary's] doctorate in Human Resources Education satisfies the requirement of being a closely related field to Engineering Education because he has been trained in cognitive sciences and pedagogy, both of which are essential to teaching engineering courses and doing engineering education research. I note that [the beneficiary's] doctoral dissertation entitled [REDACTED]

The professor further asserts that only seven individuals in the world possess a Ph.D. in this relatively new field of study of engineering education. [REDACTED] recruitment letter demonstrates that, during the underlying alien employment certification application process, the petitioner had explicitly and specifically expressed its intent to include human resources education as one of the closely related fields to the engineering education requirement stated on the DOL certified alien employment certification. The AAO also finds that the topic of the beneficiary's doctoral dissertation demonstrates that the beneficiary's studies were focused on engineering education. At a minimum, the beneficiary's Ph.D. in human resources education, which built upon his Bachelor of Science degree and Master of Science degree in electrical engineering, appears to be a related field to engineering education.

On September 26, 2011, counsel additionally submitted information to the AAO demonstrating that the National Science Foundation's (NSF) Division of Engineering Education and Centers recently awarded the beneficiary a [REDACTED] career grant in order to engage in an engineering education

research project to understand the connection between students' metacognition and how they develop their abilities in engineering design.

The AAO finds that the petitioner has established that the beneficiary's particular Ph.D. degree in human resources education focused on a closely related field to engineering education and that the beneficiary meets the educational requirements set forth on the alien employment certification. Thus, as of the petition's priority date of December 31, 2008, the beneficiary was qualified for the proffered position of assistant professor.

The beneficiary does have a U.S. Ph.D. degree. Thus, the beneficiary does qualify for preference visa classification under section 203(b)(2) of the Act. In addition, the beneficiary does meet the job requirements on the alien employment certification. For these reasons, the petition may be approved.

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 appeal is sustained. The petition is approved.