

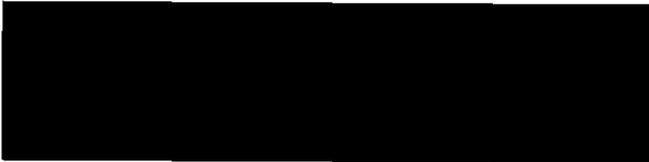
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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Date: SEP 01 2011

Office: NEBRASKA SERVICE CENTER



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 AAO will withdraw the director's decision; however, because the petition is not approvable, it is remanded for further action and consideration.

The petitioner is a test and measurement business. The director determined that the petitioner seeks to employ the beneficiary permanently in the United States as an R & D engineer 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 9089, Application for Permanent Employment Certification, which the Department of Labor certified.

The director found that the job requires a professional holding an advanced degree. 8 C.F.R. § 204.5(k)(4). The director determined that the beneficiary did not possess a bachelor's degree in chemistry or a related field plus five years of post baccalaureate progressive experience as required by the Form ETA 9089. The director denied the petition.

On appeal, counsel argues that the petitioner instead sought classification as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A) and urges the AAO to consider the proffered position as being under this other category.

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.*

Here, the petitioner filed the Form I-140 on August 17, 2007. On Part 2.d. of the Form I-140, the petitioner indicated that it was filing the petition for a professional or skilled worker. The petitioner also signed the Form I-140 under penalty of perjury, certifying that "this petition and the evidence submitted with it are all true and correct."

The AAO notes that the petitioner submitted a cover letter with its Form I-140 filed on August 17, 2007, which stated that it was submitting an "I-140 EB3." On appeal and with the beneficiary's I-485 application, the petitioner and beneficiary submitted copies of the original I-140 petition indicating that they were seeking the third preference category and not the second. It appears that an employee at the Nebraska Service Center changed the I-140 petition from the third preference category to the second preference category. However, the AAO finds that the record of proceeding lacks a formal request from the petitioner requesting to change the original petition from the third preference category to the second. The director adjudicated the petition under the second preference category.

On appeal, counsel submits a letter in which he asserts that the petitioner did not intend for the alien employment certification to require the experience to be post-baccalaureate under the second preference category. Counsel asserts that the petition called for a third preference skilled worker and that the beneficiary could have completed the experience at any point in time as long as it was before the priority date of December 21, 2006.

The regulation at 8 C.F.R. § 204.5(k)(4) states in pertinent part that "[t]he job offer portion of an individual alien employment 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, the job offer portion of the Form ETA 9089 indicates that the minimum level of education required for the position is a bachelor's degree in chemistry or a related field and that five years of experience as an R & D chemist, service representative, quality control analyst, or research technician is acceptable.

A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to United States Citizenship and Immigration Services requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Comm'r 1988).

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. In evaluating the beneficiary's qualifications, U.S. Citizenship and Immigration Services (USCIS) must look to the job offer portion of the alien employment certification to determine the required qualifications for the position. USCIS may not ignore a term of the alien employment certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). *See also, Madany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In this matter, Part H, Line 4, of the alien employment certification reflects that a bachelor's degree is the minimum level of education required. Significantly, Line 8 reflects that no *combination* of education (including no education whatsoever) "and" experience is acceptable in the alternative. Line 9 reflects that a foreign educational equivalent is acceptable.

The exact language of Lines 6 through 10-A and the petitioner's responses are relevant to the AAO's evaluation and are repeated below.

- Line 6: Is experience *in the job offered* required for the job? "No."
- Line 10: Is experience in an alternate occupation acceptable? "Yes."
- Line 10-A: If Yes, number of months experience in alternate occupation *required*: "60."
- Line 10-B: Identify the job title of the acceptable alternate occupation: "R & D Chemist, Service Representative, Quality Control Analyst, Research Te[chnician]."

(Emphasis added.) The AAO does not read the job requirements as a bachelor's degree plus either no experience at all *or* five years of experience in an alternate occupation. Such a reading is irrational as it renders the responses to Line 10 and 10-A meaningless. Thus, the most reasonable interpretation for Section H in this matter, read as a whole, is that the job does require a bachelor's plus five years of experience, but not in the actual job that is being offered.

If anything less than a bachelor's degree is acceptable, the job does not require an advanced degree professional. 8 C.F.R. § 204.5(k)(2). Once again, however, the AAO must read the entire Part H in context. On Line 4, the minimum education required is a bachelor's degree. On Line 8, the petitioner indicated that no other combination of education or experience, including a combination of experience and no education, would be acceptable. Given the petitioner's responses to Lines 6 and 8, the alien employment certification does not suggest that the petitioner would accept anything less than a bachelor's degree plus five years of experience.

The AAO finds that the beneficiary is ineligible for classification under the second preference category. The beneficiary does not possess a bachelor's degree and five years of experience in the specialty. Rather, the beneficiary earned a three-year diploma in food and drug technology from Durham College in Canada in 1981 and a one-year diploma in computer programming from DeVry Institute of Technology in Canada in 1985. The AAO notes that the petitioner has not sufficiently demonstrated the beneficiary's work experience in the form of verification letters from prior employers.

Nevertheless, as stated above the petitioner submitted a cover letter with its Form I-140 filed on August 17, 2007, which stated that it was submitting an "I-140 EB3." On appeal and with the beneficiary's I-485 application, the petitioner and beneficiary submitted copies of the I-140 petition indicating that they were seeking the third preference category and not the second. It appears that an employee at the Nebraska Service Center changed the I-140 petition from the third preference category, but the record contains no request to do so from the petitioner.

Due to the fact that the record of proceeding lacks a formal request from the petitioner requesting to change the original petition from the third preference category to the second, the AAO is remanding this matter to the director to review this petition under the third preference category.

The director must issue a new denial notice, containing specific findings that will afford the petitioner the opportunity to present a meaningful appeal. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.