

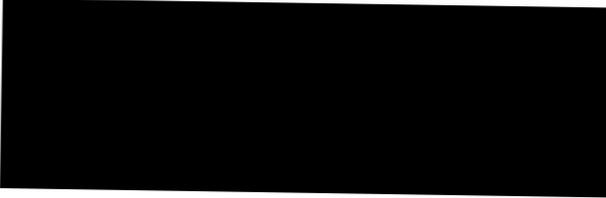


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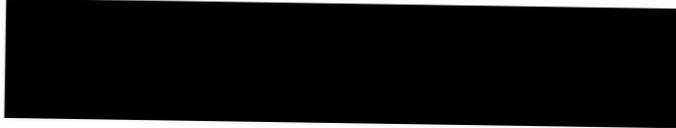
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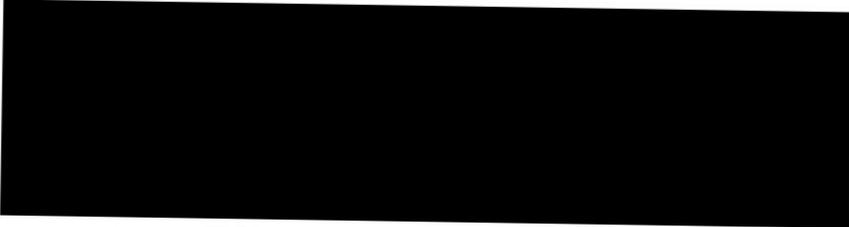
FILE: LIN 03 067 51563 Office: NEBRASKA SERVICE CENTER Date: **NOV 14 2007**

IN RE: Petitioner:  
Beneficiary:



PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. The director certified his decision to the Administrative Appeals Office (AAO). The AAO affirmed the director's decision. The petitioner appealed the matter to U.S. District Court naming as defendants the Secretary of the U.S. Department of Homeland Security (DHS), the Director of Citizenship and Immigration Services (CIS), and the Chief of the AAO. The district court granted DHS' request for summary judgment. The petitioner appealed that decision to the U.S. Court of Appeals for the Seventh Circuit. The circuit court determined that the petitioner had demonstrated that the beneficiary qualified for the proffered position according to the terms set forth in the Form ETA 750, Application for Alien Employment Certification, as certified, and reversed the decision of the district court. DHS petitioned for a rehearing. The circuit court denied this petition. The circuit court returned the matter to DHS for further proceedings consistent with the court's decision. The case is now once again before this office. The AAO hereby reopens the case pursuant to the circuit court judge's order. The AAO will withdraw its previous decision. The petition will be approved.

The petitioner is a health care facility for severely handicapped children. It seeks to employ the beneficiary permanently in the United States as a home therapy teacher. As required by statute, the petition is accompanied by a Form ETA 750 approved by the Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position. Specifically, the director determined that the petitioner could not use his degree in Marine Transportation to show that he had *relevant* post secondary education which might substitute for two years of qualifying training, such that he might qualify as a home therapy teacher, skilled worker. Therefore, the director denied the petition. He certified his decision to the AAO for review. The AAO affirmed his decision.

██████████ and ██████████ of the U.S. Court of Appeals for the Seventh Circuit held in their decision related to this matter and written by ██████████, *Hoosier Care v. Chertoff, Secretary of Homeland Security, et al.* 482 F.3d 987 (7<sup>th</sup> Cir. 2007), that the petitioner had established that the beneficiary is qualified to perform the duties of the proffered position in accordance with the terms set out on the Form ETA 750, as certified.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulations at 8 C.F.R. § 204.5(l)(2) define skilled worker as follows:

*Skilled worker* means an alien who is capable, at the time of petitioning for this classification, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States. Relevant post-secondary education may be considered as training for the purposes of this provision.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on August 7, 2002.

The Form ETA 750A at items 14 and 15 sets forth the minimum education, training, and experience that an applicant must have for the position of home therapy teacher. In the instant case, item 14 describes the requirements of the proffered position as follows:

|     |                         |                   |
|-----|-------------------------|-------------------|
| 14. | Education               |                   |
|     | Grade School            | 8 years           |
|     | High School             | 4 years           |
|     | College                 | 4 years           |
|     | College Degree Required | Bachelor's Degree |
|     | Major Field of Study    | any field         |

The Form ETA 750A also indicates that the beneficiary may substitute for the U.S. bachelor's degree in any field, a foreign equivalent degree or a credential evaluation which shows a combination of education, training and/or work experience equivalent to the U.S. bachelor's degree. No prior experience in the job offered or a related occupation is required. Item 15 of Form ETA 750A reflects that there are no other special requirements for this position.

The beneficiary set forth his credentials on the Form ETA 750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. At Item 11, eliciting information about schools, colleges and universities attended, including trade or vocational training, the beneficiary represented that he attended the Philippine Maritime Institute in Manila from August 1989 through March 1992, and that he received a Bachelor of Science degree in Maritime Transportation. Items 12 and 13 reflect that the beneficiary possesses no additional qualifications, skills, proficiencies, or licenses relevant to the proffered position. With respect to the petitioner's past work experience, at Item 15 of the Form ETA 750B, the beneficiary represented that he has been employed as a factory worker, crane operator, and baker.

As stated above in *Hoosier Care* 482 F.3d 987, the court held that the petitioner had established that the beneficiary is qualified to perform the duties of the proffered position in accordance with the terms set out on the Form ETA 750, as certified. Therefore, the petition will be approved.

This office would also note that *dicta* in *Hoosier Care* appears to suggest that the DOL analyzes, during the labor certification process, whether an intended beneficiary's post-secondary education amounts to *relevant* post-secondary education under 8 C.F.R. § 204.5(I)(2), such that the education might substitute for the two years of training or experience statutorily required for skilled worker immigrant petitions, and such that a petition might be classified as a skilled worker petition. With respect to this, the AAO would emphasize that the DOL conducts no such analyses. The DOL acknowledged this in a recent final rule codified at 72 Fed. Reg. 27904, 27905 (May 17, 2007) in which the DOL stated that it is "DHS [which] reviews the approved labor certification in conjunction with the Form I-140 petition and other supporting documents to evaluate whether the position being offered to the alien named in the petition is the same as the position specified on the labor certification and *whether the employment qualifies for the immigration classification requested by the employer* [which in this matter is the skilled worker classification]. In addition, DHS evaluates the alien's education, training, and work experience to determine whether the particular alien meets the job requirements specified on the labor certifications." (Emphasis added.) Further, in its declaration submitted in connection with the DHS petition for a rehearing before the U.S. Court of Appeals for the Seventh Circuit, the DOL stated directly that it does not consult, apply, or interpret CIS regulations at 8 C.F.R. § 204.5 when it adjudicates labor certification applications. See Declaration of William Carlson, Administrator of the Office of Foreign Labor Certification (OFLC), Employment and Training Administration (ETA), U.S. Department of Labor (DOL), dated May 25, 2007, attached. During the labor certification process, the DOL does not apply

and adjudicate any of the statutory and regulatory provisions that define employment-based immigrant visa classifications, such as the skilled worker classification. *See Id.* This office would note that the DOL may consider whether the requirements for a position as set out on the labor certification application are overly restrictive when determining whether U.S. workers will be adversely affected; however, it does not consider whether those requirements appropriately match the employment-based immigrant visa categories or standards for adjudications before CIS, contrary to suggestions made by the circuit court in *dicta* included in its *Hoosier Care* decision. *See Id.* and *Hoosier Care* generally. Such an analysis may only occur when CIS makes its determination regarding whether the employment listed on the labor certification application qualifies for the immigration classification requested by the employer.

In further support of this point, the AAO would underscore that Section 103(a)(1) of the Act charges CIS with the administration and enforcement of laws in the Act and all other laws relating to the immigration and naturalization of aliens, except insofar as those laws relate to the powers, functions and duties of the President, the Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers. In keeping with this, under Section 203(b)(3)(A)(i) of the Act, which sets out the skilled worker requirements of two years of training or experience, it is CIS, not the DOL, that has authority to determine whether a petition might be classified as a skilled worker petition; and, in turn, it is CIS which has authority to determine whether a petition and its accompanying labor certification application meet the statutory requirements of two years training or experience needed for skilled worker classification, or whether the labor certification includes *relevant* post-secondary education that might substitute for the two years of qualifying training under 8 C.F.R. § 204.5(I)(2).

This office would emphasize that 8 C.F.R. § 204.5(I)(2) is a CIS regulation, not a DOL regulation. CIS, not the DOL, is authorized to analyze whether a beneficiary's post-secondary education might be considered relevant post-secondary education that may substitute for two years of training such that a foreign worker might qualify as a skilled worker. It is CIS, not the DOL, that may authorize that a petition be classified and approved as a skilled worker petition. The DOL plays no part in these analyses.

Regarding the DOL's specific, limited authority and obligations in the immigrant petition process, the Ninth circuit stated the following, relying in part on *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983):

[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.

*K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9<sup>th</sup> 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.

*Id.* at 1009. *See also Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir.1977), "there is no doubt that the authority to make preference classification decisions rests with INS [now CIS]. The language of section

204 cannot be read otherwise . . . [and] all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.”

In sum, the DOL must certify that there are not sufficient U.S. workers available to perform the proffered position and that the foreign worker's performance of the job will not adversely affect the wages and working conditions of similarly employed U.S. workers. *See Black Const. Corp. v. INS*, 746 F.2d 503, 504 (1984). § 212(a)(14), 8 U.S.C. § 1182(a)(14). CIS then makes its own determination of the alien's entitlement to immigrant visa preference status. *See 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).

**ORDER:** The previous decision of the AAO is withdrawn. The petition is approved.

**DECLARATION OF** [REDACTED]

**I, [REDACTED], declare as follows:**

1. I am the Administrator of the Office of Foreign Labor Certification (OFLC). My program is run within the Employment and Training Administration's ("ETA") in the United States Department of Labor ("the Department"). I have held this position since June 2006. Prior to that time, I was the Regional Administrator in Boston for the USDOLETA, and before that, from May 2003 to June 2005. I held the position of Chief of the Division of Foreign Labor Certification.
2. In my capacity as Administrator of OFLC, I am responsible for overseeing DOL's adjudication of Form ETA 750, Application for Alien Employment Certification, and Form ETA-9089, Application for Permanent Employment Certification (otherwise known as "labor certification applications"). I have personal knowledge of the facts contained in this Declaration and if called to testify as a witness, I can and will competently testify as to the facts stated herein.
3. Section 212(a)(5)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(5)(A)(i), provides that an alien seeking to enter the United States as a skilled or unskilled worker is inadmissible unless the Secretary of Labor certifies to the Secretary of Homeland Security or the Secretary of State that there are not sufficient U.S. workers who are able, willing, qualified and available for the job offered to the alien, and that the employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers.

4. Approval of the labor certification application by DOL is a condition precedent to DHS' or DOS' ability to make admissibility determinations for certain employment-based immigrants. Pursuant to INA section 212(a)(5)(A), DOL has broad authority to mandate how and under what circumstances a labor market testing must be conducted so that it can certify to USCIS that there are no able, willing, qualified and available U.S. workers to fill the position and that employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers. DOL has implemented its responsibilities under the INA through the regulations found at 20 C.F.R. 656.21 et seq. These regulations require, inter alia, that the employer recruit domestic workers utilizing the actual minimum requirements for the job opportunity.
5. Under these regulations, in determining whether a valid testing of the labor market has taken place, DOL looks to the U.S. employer's description of the position and minimum work and educational requirements to ensure that qualified U.S. applicants had a legitimate opportunity to seek consideration for the position. DOL's regulatory scheme, including its evaluation of the employer's job requirements and analysis of whether the labor market has been validly tested, is not contingent upon, nor does it take into account, INA preference classification definitions or USCIS regulations governing preference classification determinations.
6. DOL makes no determination as to whether the beneficiary or position being certified meets the requirements for a particular immigrant visa classification, since these types of determinations are outside of its scope.

7. In adjudicating labor certification applications, DOL is bound by its regulations located at 20 CFR part 656. DOL does not consider or consult USCIS' regulations at 8 C.F.R. 204.5(l)(2) or (l)(4) when making labor certification application determinations. DOL has not been delegated any specific authority via these regulations.
8. The issuance of a labor certification is not a determination that the alien or the position meets the requirements of any preference classifications.

I declare, under penalty of perjury pursuant to 28 U.S.C. § 1746, that the forgoing is true and correct.

May 25, 2007.



William L. Carlson, Ph.D.  
Administrator  
OFLC, ETA  
Department of Labor