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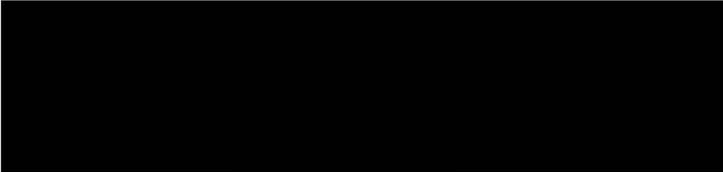
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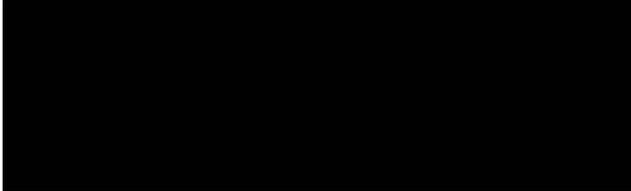
FILE: [Redacted]
SRC 06 167 53535

Office: TEXAS SERVICE CENTER Date: **JUL 17 2008**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The nature of the petitioner's business is a hospital. It seeks to employ the beneficiary permanently in the United States as a medical technologist. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL). The director determined that the petition is not approvable to classify the beneficiary as a third preference alien under section 203 (b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii) because the Form ETA-750 Labor Certification, *inter alia*, requires two years experience and the petitioner had not established that the beneficiary had the requisite related experience in the job offered before the priority date of the labor certification.

The record demonstrated that the appeal was properly filed, timely and made 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.

As set forth in the director's denial dated September 14, 2006, the single issue in this case is whether or not the petitioner had established that the beneficiary had the requisite related experience in the job offered prior to the priority date of the labor certification.

Counsel appealed the director's decision on October 2, 2006. Although counsel stated that he would submit a legal brief or additional evidence none was received. On May 23, 2008, the AAO inquired by facsimile whether counsel had supplemented the appeal and afforded five business days to respond. As of this date, approximately two months later, we have received nothing further.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of DOL. See 8 C.F.R. § 204.5(d).¹ The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by 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 9, 1999.² The proffered wage as stated on the Form ETA 750 is \$19.31 per hour (\$36,399.36 per year³). The Form ETA 750 states that the position

¹ On the petition, the petitioner claimed to have been established in 1977 and to currently employ 981 workers. The petitioner's ability to pay the proffered wage is not an issue in this case.

² It has been approximately ten years since the Application for Alien Employment Certification has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage

requires a Bachelor's of Science degree in medical laboratory technology with two years of experience in the proffered position or two years of experience in the related occupation of microbiologist.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.⁴

Relevant evidence in the record includes the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by DOL; a Citizenship and Immigration Services (CIS) Form G-325A prepared by the applicant as signed April 4, 2006; a copy of the beneficiary's nonimmigrant visa (H1B); a copy of the beneficiary's biographic passport pages from the United Kingdom and Hong Kong Special Administrative Region, the People's Republic of China; the beneficiary's CIS Form I-94; the beneficiary's certificate of attainment from the Board of Registry, American Society of Clinical Pathologists stating that she has completed the requirements and was certified as a medical technologist on September 30, 1996; the beneficiary's certificate of attainment from the American Society of Clinical Pathologists stating that she has completed the professional and educational requirements and was admitted as an associate member on 1997; and a support letter dated April 4, 2006, from the petitioner as well as other documentation.

On May 31, 2006, the director issued a request for evidence to the petitioner. The director requested evidence that the beneficiary possesses a college degree from the State University of New York at Buffalo, New York as claimed on the Form ETA 750B and evidence in the form of letters from prior employers to verify experience or other documentation that the beneficiary meets all the job qualifications specified in the ETA-750.

In response to the above request, counsel submitted an explanatory letter dated August 21, 2006, and the following evidence: the beneficiary's college degree from the State University of New York at Buffalo, New York, evidencing the attainment of a Bachelor's of Science received in 1996; two letters from the petitioner dated February 1, 2002, and August 9, 2006, by [REDACTED] acting vice president, human resources; a copy of the petitioner's newspaper advertisement dated April 14, 2002 for the position of medical technologist; and three copies of the various job postings for the position as well as the job description and performance appraisal prepared by the petitioner's department manager.

paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

³ This wage was calculated by multiplying 36.25 weekly hours by 52 weeks and by the hourly wage of \$19.31.

⁴ The submission of additional evidence on appeal is allowed by the instructions to the CIS Form I-290B, which are incorporated into the regulations by the regulation at 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).

The director denied the petition on September 14, 2006.

On appeal, counsel asserts that the two years related experience requirement on the Form ETA 750 was a typographical error and the petitioner never required two years of related experience in its recruitment efforts. According to counsel, no American worker was adversely affected by the typographical error nor had any qualified American workers been rejected for “lacking [the] so called two-year related [job] experience.”

Counsel submitted no additional evidence on appeal.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence.

Discussion

For the reasons discussed below, we find that decisions by federal circuit courts, which are binding on this office, have upheld our authority to evaluate whether the beneficiary is qualified for the job offered as certified by DOL.

Minimum Education, Training, and Experience Required to Perform the Job Duties

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification, “Offer of Employment,” describes the terms and conditions of the job offered, medical technologist. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

Minimum Education, Training, and Experience Required to Perform the Job Duties.

Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Regarding the minimum level of education and experience required for the proffered position of in this matter, Part A of the labor certification reflects the following requirements in Blocks 14 and 15:

Block 14:

Grade School	<u>8</u>
High School	<u>4</u>
College	<u>4</u>
College Degree Required	<u>B.S. [Bachelor’s of Science]</u>
Major Field of Study	<u>Medical Laboratory Technology</u>

The beneficiary must also have two years of experience in the job offered, the duties of which are delineated at Block 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision, or two years of experience in the related occupation of “microbiologist.”

Block 15

Block 15 of Form ETA 750A relating to “Other Special Requirements” stated “Must be certified as a Medical Technologist by American Society of Clinical Pathologists.”

According to the labor certification, the proffered position requires a college bachelor’s degree and two years of experience. Because of those requirements, the director determined that the proffered position is for a professional occupation. DOL assigned the occupational code of 29-2011.00 “*medical and clinical laboratory technologists*” to the proffered position.

DOL’s occupational codes are assigned based on normalized occupational standards. According to DOL’s public online database (See <<http://online.onetcenter.org/link/summary/29-2011.00> > accessed June 9, 2008) and its extensive description of the position and requirements for the position it falls within Job Zone Four requiring “considerable preparation” for the occupation type closest to the proffered position. According to DOL, two to four years of work-related skill, knowledge, or experience are needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means “[m]ost of these occupations require a four-year bachelor’s degree, but some do not.” Additionally, DOL states the following concerning the training and overall experience required for these occupations:

A minimum of two to four years of work-related skill, knowledge, or experience is needed for these occupations. For example, an accountant must complete four years of college and work for several years in accounting to be considered qualified. Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.

See id.

The Director’s Finding

The director determined that the petition requested that the beneficiary be accorded the visa preference classification under Section 203(b)(3) of the Immigration and Nationality Act (the Act), as amended, as a qualified immigrant who holds a baccalaureate degree and who is a member of the professions. As already stated, the director determined that the beneficiary did not satisfy the minimum level of employment experience stated on the labor certification before the priority date. Specifically, the director determined that the beneficiary did not have two years of job experience in the offered position of medical technologist when the request for certification was accepted on August 9, 1999, and that the beneficiary cannot be found to have met the minimum requirements stated on the Form ETA-750 as of that date.

Authority to Evaluate Whether the Alien is Eligible for the Classification Sought

As noted above, the ETA 750 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss DOL’s role in this 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.

According to 20 C.F.R. § 656.1(a), the purpose and scope of the regulations regarding labor certification are as follows:

Under § 212(a)(5)(A) of the [Act] (8 U.S.C. 1182(a)(5)(A)) certain aliens may not obtain a visa for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Attorney General that:

(1) There are not sufficient United States workers, who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and

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

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts. *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Preference Classification - Professional

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must

submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

Thus, the plain meaning of the regulatory language concerning the professional classification sets forth the requirement that a beneficiary must produce one degree to be qualified as a professional for third preference visa category purposes.

The beneficiary possesses a college degree from the State University of New York at Buffalo, New York, evidencing the attainment of a Bachelor's of Science received in 1996. Although the petitioner has not provided the beneficiary's resume of qualifications, college transcript, nor a description of the college courses taken, we note that the beneficiary has achieved a certificate of attainment from the Board of Registry, American Society of Clinical Pathologists stating that she has completed its requirements and was certified as a medical technologist on September 30, 1996. Also in the record, the beneficiary has received a certificate of attainment from the American Society of Clinical Pathologists stating that she has completed its professional and educational requirements and was admitted as an associate member on 1997. Based upon the record, we find that the beneficiary has the necessary baccalaureate degree required for entry into the occupation.⁵

Authority to Evaluate Whether the Alien is Qualified for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the 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)(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:

⁵ We must also consider whether the beneficiary meets the other job requirements such as employment experience of the proffered job as set forth on the labor certification. 8 C.F.R. § 204.5(l)(2)(i).

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). *See* section 103(a) of the Act, 8 U.S.C. § 1103(a).

The Beneficiary’s Eligibility – the Required Qualifications for the Position

In evaluating the beneficiary’s qualifications, CIS must look to the job offer portion of the labor certification to determine all the required qualifications for the position. CIS 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).

The beneficiary has attained the necessary Bachelor’s of Science degree from an accredited university in the United States. As discussed above, the beneficiary must also have two years of experience in the job offered, medical technologist, or two years of experience in the related occupation of microbiologist.

Block 15 of Form ETA 750A relating to “Other Special Requirements” stated “Must be certified as a Medical Technologist by American Society of Clinical Pathologists.”⁶ A review of the four routes to certification stated on the website of the American Society of Clinical Pathologists as accessed June 9, 2008, demonstrates that in each case a baccalaureate degree from a regionally accredited college/university is required besides other prerequisites. This requirement coincides with the requirement of a bachelor’s of science degree requirement as found in the labor certification. According to the record, the beneficiary holds this certification although how she attained it was not explained. This is relevant to the issue since several of the ‘routes’ to certification explained on the organization’s website include two years or more of job experience. However, the petitioner has failed to demonstrate whether the beneficiary qualified for certification upon her employment experience and her baccalaureate degree.

Assertion of a Typographical Error on the Labor Certification

Under this topic and at issue in this case, counsel asserts that the two years related experience requirement on the Form ETA 750 as certified was a typographical error.

⁶ *See* the website of the American Society of Clinical Pathologists found at <http://ascp.org>.

According to counsel, no American worker was adversely affected by the typographical error nor no qualified American workers have ever been rejected “by lacking [the] so called two-year related [job] experience.” Although counsel submitted no substantiation of his contention on appeal, we note that counsel submitted a letter dated August 9, 2006, by Ms. [REDACTED] that also characterized the two year employment experience requirement for medical technologist to be a preference not a requirement and asserted that its inclusion on Form ETA 750 was a typographical error.

Counsel is effectively requesting relief from CIS to amend the labor certification because counsel asserts the two year employment experience requirement is a typographical error, and therefore by implication, to be disregarded in a review of the beneficiary’s qualification relative to the labor certification.

Counsel offers no regulation or case precedent to support his assertion that CIS has the authority to consider amendments to the labor certification, which was certified by a separate entity, DOL. As will be explained in more detail below, the AAO has no authority to amend or reform the labor certification or to ignore its requirements.

The Roles of the Employer, DOL and CIS in the Employment-based Immigration Process

As discussed above, the role of the DOL in the employment-based immigration process is to make two determinations: (i) that there are not sufficient U.S. workers who are able, willing, qualified and available to do the job in question at the time of application for labor certification and in the place where the alien is to perform the job, and (ii) that the employment of such alien will not adversely affect the wages and working conditions of similarly employed U.S. workers. Section 212(a)(5)(A)(i) of the Act. Beyond this, Congress did not intend DOL to have primary authority to make any other determinations in the immigrant petition process. *Madany*, 696 F.2d at 1013. As discussed above, CIS, not DOL, has final authority with regard to determining an alien’s qualifications for an immigrant preference status. *K.R.K Irvine*, 699 F.2d at 1009 FN5 (*citing Madany*, 696 F.2d at 1011-13). This authority encompasses the evaluation of the alien’s credentials in relation to the minimum requirements for the job, even though a labor certification has been issued by DOL. *Id.*

Specifically, as quoted above, the regulation at 20 C.F.R. § 656.21(b)(6) requires the employer to “clearly document . . . that all U.S. workers who applied for the position were rejected for lawful job related reasons.” BALCA has held that an employer cannot simply reject a U.S. worker that meets the minimum requirements specified on the Form ETA-750. *See American Café*, 1990 INA 26 (BALCA 1991), *Fritz Garage*, 1988 INA 98 (BALCA 1988), and *Vanguard Jewelry Corp.* 1988 INA 273 (BALCA 1988). Significantly, when DOL raises the issue of the alien’s qualifications, it is to question whether the Form ETA-750 properly represents the job qualifications for the position offered. DOL is not reaching a decision as to whether the alien is qualified for the job specified on the Form ETA 750, a determination reserved to CIS for the reasons discussed above. Thus, DOL’s certification of an application for labor certification does not bind us in determinations of whether the alien is qualified for the job specified, but does bind us as to what those job requirements are.

Finally, where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, CIS must examine “the language of the labor certification job requirements” in order to determine what the petition beneficiary must demonstrate to be found qualified for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which CIS 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). CIS’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). CIS 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.

The beneficiary does have United States baccalaureate degree but the beneficiary does not meet the job requirements on the labor certification. The Form ETA-750 Labor Certification requires two years experience and the petitioner had not established that the beneficiary had the requisite related experience in the job offered before the priority date of the labor certification.

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.