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U.S. Citizenship
and Immigration
Services

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File: [REDACTED]
LIN-07-034-52654

Office: NEBRASKA SERVICE CENTER

Date: SEP 23 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:

[REDACTED]

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 Director, Nebraska Service Center (“director”), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (“AAO”) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is an acute care facility, and seeks to employ the beneficiary permanently in the United States as a medical assistant. As required by statute, the petition filed was submitted with Form ETA 9089, Application for Permanent Employment Certification,¹ approved by the Department of Labor (DOL). As set forth in the director’s March 7, 2008 decision, the petition was denied based on the petitioner’s failure to demonstrate that the beneficiary met the minimum educational requirement as listed on the certified Form ETA 9089.

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).²

The record shows that the appeal is properly filed, timely and makes 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.

The petitioner has filed to obtain an immigrant visa and classify the beneficiary as a skilled worker. 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 petitioner must establish that its ETA 9089 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 9089. The priority date is the date that Form ETA 9089 Application for Permanent Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor (“DOL”). *See* 8 CFR § 204.5(d). Therefore, 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. The petitioner’s ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

¹ On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA-9089 replaced the Application for Alien Employment Certification, Form ETA 9089. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

² The submission of additional evidence on appeal is allowed by the instructions to the 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).

In the case at hand, the petitioner filed Form ETA 9089 with the respective DOL processing center on July 27, 2006. The proffered wage as stated on Form ETA 9089 is \$22,704 per year. The labor certification was approved on October 13, 2006, and the petitioner filed the petition on the beneficiary's behalf on November 16, 2006. The petitioner listed the following information on the petition: established: 1966; gross annual income: \$60 million; net annual income: "pls. see attached;" and current number of employees: 1,093.

On October 19, 2007, the director issued a Request for Evidence ("RFE") for the petitioner to submit: signed pages 8 and 9 of Form ETA 9089; evidence that the beneficiary had the required education as listed on Form ETA 9089; copies of employment verification letters; an explanation of what an Associate's Degree in Medicine is and that such a degree actually exists; and copies of advertisements the petitioner used for recruitment for the position, which listed the position's requirements. The petitioner responded.

On March 7, 2008, the director denied the petition. The director cited in his decision that the petitioner had required an Associate's degree in Medicine or Nursing as well as two years of experience in the job offered or a related field. The director stated that the Bureau of Labor Statistics website, <http://bls.gov/oco/ococs164.htm#training> indicated that Medical Assistant postsecondary programs, which result in the award of an associate's degree contain courses that cover anatomy, physiology, and medical terminology, as well as typing, transcription, record-keeping, accounting, and insurance processing. The petitioner submitted the beneficiary's educational documents with his transcripts, which showed that he had a Doctor of Medicine degree and had taken courses in anatomy, and physiology, but that he lacked courses in typing, transcription, record-keeping, accounting and insurance processing. Accordingly, the director found that the beneficiary's Doctor of Medicine degree would not be the equivalent of a qualifying associate's degree, and the beneficiary did not meet the requirements of the Form ETA 9089. The petitioner appealed and the matter is now before the AAO.

In evaluating the beneficiary's qualifications, Citizenship and Immigration Services ("CIS") must look to the job offer portion of the alien labor certification to determine the required qualifications for the position. **CIS may not ignore a term of the labor certification, nor may it impose additional requirements.** (Emphasis added). See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany 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). A labor certification is an integral part of this petition, but the issuance of a Form ETA 9089 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

On the Form ETA 9089, the "job offer" position description for a Medical Assistant lists the following duties:

Perform administrative and clinical duties under the direction of physician. Take and record vital signs and medical histories. Prepare patients for examination, draw blood and administer medication. Maintain medical records. Perform coding for insurance purposes. Assist physicians in examination and treatment of patients, etc.

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

H.4. Education: Minimum level required: Associate's degree.³
4-A. Provides "if other indicated in question 4 [in relation to the minimum education], specify the education required."

The petitioner left this blank.

4-B. Major Field Study: Medicine.

7. Is there an alternate field of study that is acceptable?

The petitioner indicated Nursing as an alternate field of study.

8. Is there an alternate combination of education and experience that is acceptable?

The petitioner checked "yes" to this question.

8-A. If yes, specify the alternate level of education required:

Associate's.

8-B. If Other is listed in question 8-A [in relation to alternate combination and experience], indicate the alternate level of education required.

2 years of experience.

9. Is a foreign educational equivalent acceptable?

The petitioner listed "yes" that a foreign educational equivalent would be accepted.

6. Experience: 24 months (2 years) in the position offered, as a Medical Assistant,
10. or 24 months (2 years) in the related occupation of Medical Researcher or Medical Practitioner.

14. Specific skills or other requirements: occasional overtime/weekend duties.

In looking at the beneficiary's qualifications, on Form ETA 9089, signed by the beneficiary, the beneficiary listed his highest level of achieved education related to the requested occupation as a Doctorate in Medicine. He listed the institution of study where that education was obtained as Ishafan Province University of Medical Sciences School of Medicine, Eshafan, Iran, and the year completed as 2001.

The petitioner submitted an evaluation of the beneficiary's education:

³ We note that the petitioner filed a Form I-129 H-1B petition for the beneficiary for the position of a Medical Research Associate pursuant to 101(a)(15)(H)(i)(b) of the Act. This position required that the beneficiary have a bachelor's degree related to the position offered. If the petitioner currently employs the beneficiary in a position where a bachelor's degree is not required, then an approved H-1B petition may be revocable.

Evaluation One:

- Evaluation: Morningside Evaluations and Consulting, New York, New York.
- The evaluation states that the beneficiary had a M.D. degree, Doctor of Medicine, received in 2001.
- Entrance into Isfahan University of Medical Sciences and Health Services, where the beneficiary obtained his degree, requires graduation from high school and completion of competitive entrance exams.
- The beneficiary completed coursework in general studies, including English, social sciences, mathematics, and sciences. He specifically completed courses in his area of concentration, including Medicine, Forensic Medicine and Poisonings, Internal Disease Ward, Obstetrics and Gynecology Ward, Specialized Pathology, and related areas.
- The evaluator states that based on “the courses of studies undertaken, the number of credits earned, the number of years of coursework, the grades earned for coursework and the final diploma of all indicate that [the beneficiary] satisfied requirements equivalent to those required for the attainment of a University degree from an accredited institution of higher education in the United States.” The evaluator continues, “On the basis of the credibility of Isfahan University of Medical Sciences and Health Services and the hours of academic coursework, it is the judgment of Morningside Evaluations and Consulting that [the beneficiary] has attained the equivalent of a Doctor of Medicine degree from an accredited institution of higher education in the United States.”
- The evaluator further stated that, “The preceding is an evaluation of [the beneficiary’s] academic credentials. The evaluation provides an academic equivalency not a professional equivalency . . . [and] does not, in any way, attest to [the beneficiary’s] ability to practice Medicine or license him in the practice of Medicine or in any related professional capacity.”

The director denied the petition as he found that the beneficiary’s education lacked courses required to be a medical assistant and his education would not be equivalent to an Associate’s in Medicine as required by the terms of the labor certification.

On appeal, the petitioner asserts that the director failed to consider the beneficiary’s eligibility under “the acceptable alternate minimum educational requirement as stated in part H of the certified ETA 9089.” In support, the petitioner provided a second educational evaluation, which counsel asserts assessed the beneficiary’s education as equivalent to an Associate’s degree in Nursing.

Evaluation Two:

- Evaluation: Global Education Group, Inc., Miami Beach, FL.
- The evaluator states that she reviewed the beneficiary’s educational credentials and compared his coursework to that of both a U.S. Associate’s degree program in Nursing and a U.S. Doctor of Medicine program. She concluded, based on her review, that, “[the beneficiary’s] credentials meet the minimum educational requirements for the position of medical assistant.”
- She reviewed the duties as listed on the Form ETA 9089: administrative and clinical duties under the direction of a physician; take, record vital signs, and medical histories; prepare patients for exams; draw blood, administer medication; maintain records; perform coding for insurance purposes; assist physicians in examination and treatment of patients.
- The evaluator cites to the director’s decision: that CIS stated in its decision that medical assistant post-secondary programs, which result in associate degrees would include courses that cover anatomy, physiology, and medical terminology, as well as typing, transcription, record-keeping,

accounting, and insurance processing, but that the beneficiary's education would not be considered adequate for purposes of meeting the labor certification requirements.

- The evaluator states that U.S. Associate degrees in Nursing programs include coursework such as: Human Anatomy and Physiology; Principles of Chemistry; Nutrition; Microbiology; General Psychology; Introduction to Sociology; Elementary Statistic Reasoning; Foundations of Nursing; Assessment courses, including age related studies; Women's Health; Mental Health, and other related courses.
- The evaluator states that she was unable "to find evidence of required course work in typing, transcription, record-keeping, accounting, and insurance processing as standard curriculum subjects in U.S. Associate's degree in Nursing programs. Regarding the remainder of the requirements (courses which cover anatomy, physiology, and medical terminology), these are usually standard subjects studied in both U.S. Associate's degree programs in Nursing as well as in U.S. Doctor of Medicine programs." Further, the evaluator states that U.S. Doctor of Medicine degree programs "have a more in depth study of the aforementioned topics along with the remaining medical curriculum which includes professional clerkships as well as "Practice of Medicine" study and training (encompassing medical practice skills training, professionalism, exposure to specialists, hospital information systems and clerkship mechanics; MD in Society, study and training on the health care system" as well as training in communications: interviewing, history taking, psychiatric interviewing, etc. Therefore, the evaluator states that a candidate with a Doctor of Medicine degree would possess "more of the required education and training pertinent to performing the duties of the medical assistant position than that of the accepted Associate's degree (in Nursing) holder."
- She concludes that the beneficiary's educational documents are the equivalent of a U.S. Doctor of Medicine degree, and that a candidate with a Doctor of Medicine degree would meet the minimum requirements for the position of a medical assistant, and would possess more advanced skills than a individual with an Associate's degree in Nursing.

We disagree with counsel's interpretation that the evaluator concludes that the beneficiary's education would be equivalent to an Associate's degree in Nursing. Rather, she concludes that the beneficiary's program of study is more advanced and more applicable to the instant position than an Associate's degree in Nursing. The evaluator determined the beneficiary's education to be the equivalent of a U.S. Doctor of Medicine degree.

Evaluation Three:

- Evaluation: Global Education Group, Inc., Miami Beach, FL.
- The Global Education Group provided a second separate evaluation to address the beneficiary's education and its U.S. equivalency.
- The evaluator states that the beneficiary's education is the equivalent of the U.S. degree of Doctor of Medicine awarded by a regionally accredited university in the United States based on the completion of medical studies at Isfahan University of Medical Sciences in Iran.
- The evaluator provides a course by course equivalency of the beneficiary's studies and their respective U.S. credits. The document reflects that the beneficiary took courses in: biochemistry, histology, principles of health services, medical physics, microbiology, biology, family health, genetics, pharmacology, pathology segments related to different conditions, and other courses, as well as completing a number of "clerkships" and internship rotations through various wards.

The petitioner also submitted a copy from the Northern Virginia Community College 2007-2008 catalog for a Nursing, Associate of Applied Science Degree, which listed required courses for the program as: Medical

Terminology, Nursing, General Pharmacology, Introduction to Psychology, Nursing Management, and other courses.

On appeal, counsel asserts that the director “created a new minimum educational requirement for the position based on the Bureau of Labor Statistics (“BLS”) website of a ‘Medical Assistant postsecondary program resulting in [an] associate’s degree’.” Counsel asserts that CIS erred in substituting its judgment for DOL, and CIS erred in referencing requirements of transcription, record keeping, and insurance processing as these aspects were not relevant in determining whether the beneficiary had the required minimum education.

Further, counsel asserts that CIS failed to analyze whether the beneficiary met the acceptable alternate field of study in nursing to satisfy the minimum requirements of the petition. DOL accepted in certifying the labor certification application that an Associate’s in Nursing was a valid alternate field of study. Additionally, counsel contends that the evaluation provided by the Global Education Group assessed the beneficiary’s education to be the equivalent of an Associate’s degree in Nursing. Further, the Global Education Group’s course by course analysis concluded that the beneficiary’s coursework would exceed the requirements for an Associate’s degree in Nursing, and that such a degree would not require coursework in typing, transcription, record-keeping, and such tasks. Additionally, the petitioner submitted courses required by a community college for its nursing program as an example. Therefore, counsel concludes that the beneficiary’s Doctor of Medicine degree would meet the minimum position requirements.

We note that the Global Education Group’s evaluation does not state that the beneficiary’s education is equivalent to a degree in nursing, but rather that his education would meet the position’s requirements, and would be equivalent to a U.S. Doctor of Medicine degree.

The director’s decision raised the issue that the beneficiary does not have skills in record keeping, insurance coding and other skills normally relevant for a “medical assistant” position. However, the instant job description only references “administrative duties,” which is vague and may or may not encompass typing, and transcription activities. The position offered does not specifically require extensive typing and transcription duties. A review of the O*Net Online database at <http://online.onetcenter.org/link/summary/31-9092.00> (accessed September 17, 2008) and its summary for medical assistants does not reference extensive administrative duties in its immediate tasks. The O*Net description does include a reference that clerical knowledge would be required for the position. Thus, the director improperly contravened the holding in *Silver Dragon* by adding additional requirements into the proffered position than was specified by the petitioner during the labor certification process overseen by DOL.⁴ An alien holding a degree more advanced than that listed on the labor certification would not render the beneficiary unqualified for the position.

The director also questioned whether an associate’s degree in medicine is a degree offered by schools. We note that a general search of the Internet shows that varying schools and educational programs offer a wide variety of courses of study and associate’s degrees, including: degrees in Health & Medicine, Medical Office Administration, Medical Transcription, Science, Pre-Medicine and Pre-Medical Studies, Healthcare Administration, and other programs. Further, the ads supporting the labor certification list that the employer

⁴ The issue identified implies the director’s concern about whether the petitioner intends to employ the beneficiary in the position offered. A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(C)(2). It appears based on the beneficiary’s skill level that the petitioner may employ the beneficiary in a more advanced position than implied by the job duties and the job title. This, however, is speculation and DOL certified the position, based on the title, and the salary offered.

would accept an associate's degree in the field of medicine, nursing, or allied health professions. Thus, the petitioner used more expansive language in its advertisements to the public, including "allied health fields," and not restricting the degree to just medicine or nursing. Therefore, we accept that an "Associate's degree in Medicine" would be an accepted field of study, and that the beneficiary's education, as a degree more advanced than the required education, would meet the minimum requirements of the position offered.

Based on the foregoing, the petitioner has established that the beneficiary met the requirements of the certified ETA 9089. Accordingly, the petition will be sustained. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

ORDER: The appeal is sustained. The petition is approved.