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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



B5

Date: **FEB 24 2012**

Office: TEXAS 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:

SELF REPRESENTED

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 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 petitioner is [REDACTED]. It seeks to employ the beneficiary permanently in the United States as [REDACTED]. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the beneficiary did not possess the required experience for the offered position as set forth in the ETA Form 9089. The director denied the petition accordingly.

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.

As set forth in the director's August 28, 2009 denial, the single issue in this case is whether the beneficiary possessed the required experience for the offered position as set forth in the ETA Form 9089.

In pertinent part, section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), 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.*

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

A beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

In evaluating the requirements for the offered position, U.S. Citizenship and Immigration Services (USCIS) must look to the job offer portion of the labor certification. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon*

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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).

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. Iwine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coorney*, 661 F.2d 1 (1st Cir. 1981).

USCIS must examine “the language of the labor certification job requirements” in order to determine what the job requires. *Mandany*, 696 F.2d at 1015. 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 a labor 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 labor 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 labor certification that the DOL has formally issued or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

Here, the DOL accepted the ETA Form 9089 on September 5, 2008. The DOL’s role is limited to determining whether there are sufficient workers who are able, willing, qualified, and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to the 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. See *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1012-1013.

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. See *N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff’d*, 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

The required education, training, experience, and special requirements for the offered position are set forth at Part H of the ETA Form 9089. Here, Part H shows that the position requires a master’s degree, or foreign educational equivalent, in computer science, math, “mechanical physics,” electrical engineering and 36 months of experience in the job offered or in the alternate occupations of software developer, analyst programmer, consultant, or computer programmer. The petitioner will also accept a bachelor’s degree and 60 years of experience. In this matter, the beneficiary claims to have a bachelor’s degree; therefore, he must also have the work experience as outlined in the ETA Form 9089, Part H, Item 8-C.

Evidence relating to qualifying experience must be in the form of letters from former employers which include the name, title, and address of the writer and a specific description of the duties performed by the alien. 8 C.F.R. § 204.5(g)(1).

The record contains a variety of work experience letters. In denying the petition, the director states that because much of the experience was not listed on the ETA Form 9089, the experience cannot be used to establish that the beneficiary meets the experience requirements of the labor certification. In support of this statement, the director cites *Matter of Leung*, 16 I&N Dec. 12 (Reg. Comm. 1976), as standing for the proposition that "new employment not listed when the labor certification was certified or when the visa petition was filed is not credible for the issuance of an immigrant visa classification."

Even if the evidence were sufficient under the regulations, the petitioner fails to offer any credible explanation for its omission of this additional work experience from the ETA Form 9089 when the instructions to Park K clearly require the listing of all experience which qualifies the beneficiary for the job offered. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. See, *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Furthermore, even considering both the letters from employers not listed on the ETA Form 9089 and letters from listed employers, none of the letters provides a specific description of the beneficiary's duties in any of the positions so that USCIS can conclude that he has at least 60 years of experience performing the duties of any of the acceptable jobs listed in the labor certification. 8 C.F.R. § 204.5(g)(1). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Finally, even assuming that the ETA Form 9089, Part H, Item 8-C, was intended to require 60 months of experience, rather than 60 years, the record similarly fails to establish that the beneficiary had the requisite work experience by the priority date for the same reasons. 8 C.F.R. § 204.5(g)(1). However, as USCIS is prohibited from ignoring a term of a labor certification and is required to accept the plain language of the ETA Form 9089 exactly as completed by the employer, USCIS must consider Part H, Item 8, as requiring a bachelor's degree and 60 years of experience as an alternate

work requirement. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. at 406; *Mandany v. Smith*, 696 F.2d 1008; *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829.

The record does not establish that the beneficiary meets the minimum requirements of the offered position as set forth in 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.