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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

DATE **AUG 02 2013** OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition and the petitioner filed a motion to reopen the denial, which was also denied. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's October 22, 2012 decision will be withdrawn. The petition will be remanded.

The petitioner describes itself as a software development and consulting firm. It seeks to permanently employ the beneficiary in the United States as a business systems analyst. On the Form I-140, Immigrant Petition for Alien Worker, the petitioner requested classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).

The director's decision denying the petition concluded that the petition cannot be approved because the labor certification does not require a member of the professions holding an advanced degree. On appeal, the petitioner states that it would only hire an individual with an advanced degree or an acceptable equivalent for the proffered position. The petitioner states that the proffered position is extremely complex and that only those persons with the equivalent of a master's degree or bachelor's degree with five years of experience would be qualified for the position.

The appeal is properly filed and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis.¹ The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.² A petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision.³

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.

¹ See 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., *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

² The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 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).

³ See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or aliens of exceptional ability, whose services are sought by an employer in the United States. *See also* 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

[A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. 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

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

- (A) An official academic record showing that the alien has an United States advanced degree or a foreign equivalent degree; or
- (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, the regulation at 8 C.F.R. § 204.5(k)(4)(i) states, in part:

The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.

In summary, a petition for an advanced degree professional must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree. Specifically, for the offered position, the petitioner must establish that the labor certification requires no less than a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, *or* a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty.

In the instant case, Part H of the labor certification submitted with the petition states that the offered position has the following minimum requirements:

- H.4. Education: Bachelor's.
- H.5. Training: None required.
- H.6. Experience in the job offered: None required.
- H.8. Alternate combination of education and experience: Accepted.
- H.8-A. Other education accepted
- H.8-B. Acceptable level of education: Education combination equivalent to bachelor's degree.
- H.8-C. Number of years experience acceptable: 5 years.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: Accepted.
- H.14. Specific skills or other requirements: The requirements for the position will be a bachelor's degree in business, business administration, finance, computer science, engineering or related field, including three year bachelor degree combined with one year graduate diploma and five years of post-baccalaureate progressive experience as a business systems analyst, systems analyst, quality assurance analyst, software engineer or combination thereof. Relocation possible. Experience must include minimum two years working with MS SQL Server 2005 DB testing, Mainframe DB Testing, Oracle DB Testing, Win 2000, MS DOS, UNIX, C, Test Director/Quality Center, Selenium, QTP, VB Script. Will accept any suitable combination of education, training, and/or experience evaluated as equivalent to a U.S. bachelor's degree for bachelor requirement.

The director held that the language provided in the provision in H.14 that experience or training "evaluated as equivalent to a U.S. bachelor's degree" would be accepted meant that the petition does not qualify for advanced degree professional classification. The petitioner reiterates on appeal that it would accept an applicant with less than a master's or bachelor's degree if the applicant held "an equivalent" to the educational degree. 8 C.F.R. § 204.5(k)(3)(i) specifically provides that a degree or foreign degree equivalent is required for the classification; equivalencies based on training or experience do not support the category. Part H.14 specifically discusses the part H.8 alternate education and experience required for the position as well as what the petitioner defined "equivalent" to mean. The last sentence of part H.14 appears to be language mandated by the DOL pursuant to *Matter of Francis Kellogg*, 94 INA 465 (BALCA 1998). When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983). The AAO does not interpret the language to mean that the employer would accept lesser qualifications than the stated primary and alternative requirements on the labor certification, and it would potentially make any labor certification with alternative requirements ineligible for classification as an advanced degree professional. See the following Board of Alien Labor Certification Appeals (BALCA) decisions: *Federal Insurance Co.*, 2008-PER-00037 (BALCA Feb. 20, 2009) and *Matter of Agma Systems LLC*, 2009-PER-00132 (BALCA Aug. 6, 2009). As a result, the director's decision is withdrawn.

The petition is not currently approvable, however, because of certain issues that arose beyond the director's decision. Specifically, the evidence in the record does not indicate whether the petitioner has the continuing ability to pay the proffered wage as of the priority date. *See* 8 C.F.R. § 204.5(g)(2).

According to USCIS records, the petitioner has filed over 300 Form I-129 and I-140 petitions on behalf of other beneficiaries including seven Form I-140 petitions filed in September 2011, the instant priority date, or thereafter. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary with a petition pending from the priority date of the instant petition onward. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). The evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence.

In addition, it is noted that the director's decision finding that the labor certification does not require a member of the professions holding an advanced degree did not address whether or not the petitioner had the ability to pay the proffered wage from the priority date onwards. The AAO further notes that that the beneficiary's Bachelor of Commerce degree and post graduate diploma in Human Resources Development may not meet the requirements of the labor certification that the applicant possess a degree in business, business administration, finance, computer science, or engineering.

As the petitioner has not had an opportunity to address the issue related to the sponsorship of multiple beneficiaries or whether the beneficiary's degree is in one of the subjects required by the terms of the labor certification, we will remand the petition back to the director to allow the petitioner to address these issues.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for review and consideration of the additional issues that impact the petitioner's eligibility for the visa that were not initially identified by the director. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director may review the entire record and enter a new decision.

ORDER: The director's decision denying the petition is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.