



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF F-O-G-, INC.

DATE: APR. 24, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a German school and cultural center, seeks to employ the Beneficiary as its executive director. It requests classification of the Beneficiary as a member of the professions holding an advanced degree or an alien of exceptional ability under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This “EB-2” employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree or an alien of exceptional ability for lawful permanent resident status.

The Director of the Texas Service Center denied the petition on the ground that the minimum educational and experience requirements for the proffered position, as stated on the labor certification, were less than required for classification of the job as an advanced degree professional.

On appeal the Petitioner asserts that the Beneficiary qualifies for “EB-2” classification based on her exceptional ability, which was not addressed by the Director.

Upon *de novo* review, we will withdraw the Director’s decision and remand the case for further consideration and the issuance of a new decision.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

Section 203(b)(2)(A) of the Act provides that employment-based immigrant visas may be granted to qualified immigrants:

- who are members of the professions holding advanced degrees or their equivalent, or
- who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States.

As defined in the regulations:

Advanced degree means any 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.

.....
Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

8 C.F.R. § 204.5(k)(2).

II. ANALYSIS

The Petitioner's Form I-140, Immigrant Petition for Alien Worker, indicated in Part 2.1.d. that the petition was being filed for a member of the professions holding an advanced degree or an alien of exceptional ability. The Form I-140 does not obligate or allow a petitioner to choose between those two types of EB-2 classification on the face of the document.

Petitions for an advanced degree professional or an alien of exceptional ability must generally be accompanied by a valid, individual labor certification. 8 C.F.R. § 204.5(k)(4)(1). A beneficiary must meet all of the education, training, experience, and other requirements specified on the labor certification as of the petition's priority date¹ (in this case November 24, 2014). For a proffered position to be eligible for EB-2 classification the job offer portion of the labor certification must demonstrate that the job requires a professional holding an advanced degree or an alien of exceptional ability. 8 C.F.R. § 204.5(k)(4)(i). The labor certification in this case requires a bachelor's degree in German studies, or a foreign educational equivalent, 48 months of qualifying experience, and a certificate to teach German as a foreign language.

The regulation at 8 C.F.R. § 204.5(k)(3) lists the items of evidence the must accompany an EB-2 petition to show that the qualified immigrant is a professional holding an advanced degree or an alien of exceptional ability in the sciences, arts, or business. The documentation submitted by the Petitioner with its Form I-140 included required evidence for both an advanced degree professional and an alien of exceptional ability.

¹ The priority date of a petition is the date the underlying labor certification was filed with the DOL.

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The Director found that the proffered position does not qualify for advanced degree professional classification because the minimum educational and experience requirements, as stated in the labor certification, are a bachelor's degree and 48 months of experience. Since the job requirements are less than a bachelor's degree and five years of experience, the Director concluded that the job does not require an "advanced degree" as defined in 8 C.F.R. § 204.5(k)(2). If the labor certification allows for less than an advanced degree, the proffered position does not qualify for advanced degree professional classification. The Director did not include an exceptional ability analysis in his decision.

On appeal, the Petitioner claims that the Beneficiary qualifies for EB-2 classification based on her exceptional ability. The Petitioner notes that it requested classification of the Beneficiary as either an advanced degree professional or an alien of exceptional ability by selecting box 1.d. in Part 2 of the Form I-140. In support of the appeal the Petitioner submits documentation related to the claim of exceptional ability, some previously submitted, some new, and discusses these materials in the context of the evidentiary requirements of 8 C.F.R. § 204.5(k)(3).

Since the Director did not consider the Beneficiary's qualifications for classification as an alien of exceptional ability, we will remand the case for that purpose, and any other issue(s) the Director may deem relevant.

III. CONCLUSION

We will remand this case to the Director for further consideration of the Petitioner's qualifications for EB-2 classification as an alien of exceptional ability.

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

Cite as *Matter of F-O-G-, Inc.*, ID# 1113921 (AAO Apr. 24, 2018)