



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

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

In Re: 22436919

Date: SEP. 29, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner, a professional service provider, seeks to employ the Beneficiary as a financial analyst under the second-preference, immigrant classification for members of the professions with advanced degrees or their equivalents. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

The Director of the Nebraska Service Center denied the petition, concluding that the minimum requirements on the supporting ETA Form 9089, Application for Permanent Employment Certification (labor certification), did not support the requested advanced degree professional classification.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The Administrative Appeals Office (AAO) reviews the questions in this matter *de novo*. See *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will dismiss the appeal.

## I. LAW

Immigration as an advanced degree professional generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). See section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. *Id.* Labor certification also indicates that the employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the certified labor application with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). See section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves the petition, a foreign national may finally 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.

For the requested second-preference, immigrant classification for members of the professions with advanced degrees or their equivalents, the term “advanced degree” is defined in the regulation at 8 C.F.R. § 204.5(k)(2) as follows:

*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.

## II. ANALYSIS

The Petitioner indicated on the Form I-140, Immigrant Petition for Alien Worker, Part 2, Box 1.d. that it was filing a petition for a member of the professions holding an advanced degree. As required by statute, the petition is accompanied by an approved labor certification, certified by the DOL. See Section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5)(D); see also 8 C.F.R. § 204.5(a)(2). The priority date of the petition is September 14, 2020.<sup>1</sup>

As noted above, the job offer portion of the labor certification underlying a petition for an advanced degree professional must require a “United States academic or professional degree or a foreign equivalent degree above that of baccalaureate [or] 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.” 8 C.F.R. § 204.5(k)(2). In addition, the beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing’s Tea House*, 16 I&N Dec. 158, 159 (Act. Reg’l Comm’r 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg’l Comm’r 1971).

The required education, training, experience, and skills for the proffered position of financial analyst are set forth at Part H of the labor certification. The accompanying labor certification states the minimum requirements of the offered position of financial analyst as follows:

H.4	Education: minimum level	Bachelor’s
H.4-B	Major field of study	Finance
H.5	Training required?	No
H.6	Experience in the job offered required?	Yes
H.6-A	Number of months	6
H.7	Alternate field of study acceptable?	No
H.8	Alternate combination of education and experience acceptable?	No
H.8-A	Level of alternate education	No

---

<sup>1</sup> The priority date is the date the DOL accepted the labor certification for processing. See 8 C.F.R. § 204.5(d).

H.9	Foreign educational equivalent acceptable?	Yes
H.10	Experience in an alternate occupation acceptable?	Yes
H.10-A	Number of months experience required	6
H.10-B	Job title of alternate occupation	Business Analyst
H.14	Detail oriented and organized. Be able to multi-task across concurrent project. Be able to communicate effectively and interact to all level of the company and third parties. Comfortable working both independently and as a member of a collaborative team.	

As noted above, a petition for an advanced degree professional must establish that, among other things, the job offer portion of the labor certification requires at least a professional degree above that of baccalaureate, or a baccalaureate degree followed by at least five years of progressive experience. Here, the Director found that, because the position required only a bachelor’s degree and six months of experience, the labor certification did not support a petition for advanced degree professional classification.

On appeal, the Petitioner seeks to change the requested visa classification from advanced degree professional to the third-preference classification for a professional.<sup>2</sup> The Petitioner argues that it has consistently required a bachelor’s degree and only six months of experience for the offered position and that, due to human error, the incorrect box on the Form I-140 was checked.

To request a change in visa classification on a Form I-140, USCIS policy requires a petitioner to demonstrate that the selected classification resulted from “clerical error” before the issuance of a decision. USCIS, “Petition Filing and Processing Procedures for Form I-140,” <https://www.uscis.gov/forms/petition-filing-and-processing-procedures-form-i-140-immigrant-petition-alien-worker> (last visited September 28, 2022).

Here, the timing of the Petitioner’s request, after the Director’s decision was issued, precludes a change of visa classification on the petition. USCIS policy states: “We cannot change the visa category if we have already made a decision on your Form I-140.” *Id.* Rather, USCIS policy requires a petitioner to review the requested visa classification stated on a Form I-140 receipt notice shortly after a petition’s filing and report any misclassification before the petition’s adjudication. *Id.* The record indicates that, before denying the petition, USCIS mailed the Petitioner a receipt notice identifying the selected visa classification as “203 B2 ADV DEGREE-EXC ABILITY.” Contrary to USCIS policy, however, the Petitioner did not report the purported misclassification until filing this appeal. We therefore decline to change the petition’s requested visa classification.

---

<sup>2</sup> The third-preference, immigrant classification for professional workers allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii).

The Petitioner also states that it “should be given a second chance because the denial decision is based on an immaterial human mistake.” However, we disagree that the mistake here is immaterial. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm’r 1998).

As the labor certification does not require a degree above a baccalaureate as the minimum level of education in the Petitioner’s requirements, the labor certification cannot support a petition for an advanced degree professional and the appeal is dismissed on this basis.

We note that the even if the Petitioner had requested the correct classification on the Form I-140, it has not established eligibility for the requested benefit in all aspects. Although unaddressed by the Director, the record does not establish the Petitioner’s ability to pay the proffered wage of the offered position, or that the Beneficiary meets the minimum requirements for the offered position as stated on the labor certification.

A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition’s priority date until a beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2). If a petitioner employs less than 100 people, as in this case, evidence of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. *Id.* Here, the labor certification states the proffered wage of the offered position of financial analyst as \$73,450 annually, and the petition states that the Petitioner has ten employees. As previously noted, the petition’s priority date is September 14, 2020.

In determining a petitioner’s ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner’s submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner’s ability to pay the proffered wage. In this case the labor certification indicates that the Beneficiary has been employed by the Petitioner since April 1, 2018. No records have been submitted, however, to indicate how much compensation the Beneficiary has received from the Petitioner since then. Accordingly, the Petitioner has not established its continuing ability to pay the proffered wage based on wages paid to the Beneficiary from the priority date onward.

The record includes the Petitioner’s 2020 Form 1065, U.S Return of Partnership Income. However, the net income (-\$17,344) and net current assets (-\$2,475) reflected on the petitioner’s tax return are both in the negative and below the proffered wage. The Petitioner has not demonstrated its continuing ability to pay the proffered wage as required by 8 C.F.R. § 204.5(g)(2).<sup>3</sup>

---

<sup>3</sup> We note that where a petitioner has filed I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. See *Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition’s approval where, as of the filing’s grant, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions). USCIS records show that the Petitioner has filed one other Form I-140 petition for another beneficiary. Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiary of the other Form I-140 petition that was pending or approved as of, or filed after, the priority date of the current petition.

The record also lacks evidence that the Beneficiary meets the minimum requirements of the offered position as stated on the labor certification. The labor certification states that the offered position requires a bachelor's degree in finance and six months of experience in the job offered or as a business analyst. The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The record does not include evidence that the Beneficiary possesses a bachelor's or foreign equivalent degree in finance.<sup>4</sup> Additionally, the record does not include letters or other evidence demonstrating that the Beneficiary meets the required six months of experience. Therefore, the Petitioner has not demonstrated that the Beneficiary met the minimum requirements as stated on the labor certification at the time of filing.

If all required initial evidence is not submitted with the application or petition, or does not demonstrate eligibility, USCIS, in its discretion, may deny the petition. *See* 8 C.F.R. § 103.2(b)(8)(ii). Because the record does not include the initial required evidence, the appeal is also dismissed on this basis.

### III. CONCLUSION

The record does not establish that the labor certification supports the requested classification of advanced degree professional, that the Beneficiary meets the minimum experience requirements as set forth on the accompanying labor certification, or that the Petitioner has the continuing ability to pay the Beneficiary the proffered wage. Therefore, the appeal is dismissed.

It is the Petitioner or Applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Here, the burden has not been met.

**ORDER:** The appeal is dismissed.

---

<sup>4</sup> On the labor certification, the Beneficiary claims to have earned a bachelor's degree in finance from the University of [redacted] in 2015. The record includes an academic transcript issued by [redacted] University stating that the Beneficiary was awarded a master of science degree in business analytics in February 2018. However, this transcript is not sufficient to demonstrate that the Beneficiary possesses the required bachelor's or foreign equivalent degree in finance. In any further filings, the Petitioner must submit evidence of the Beneficiary's bachelor's degree in finance in the form of an official academic record pursuant to 8 C.F.R. § 204.5(k)(3)(i)(B).