

U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: WAC-02-077-53813

Office: California Service Center

Date: **MAR 26 2003**

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:



PUBLIC COPY

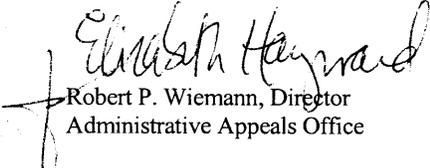
INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks to employ the beneficiary as a reporter. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the position does not require an advanced degree professional, that the beneficiary is not an advanced degree professional, and that the petitioner had not established its ability to pay the beneficiary the proffered wage.

On appeal, counsel requests that the petition be amended to seek classification of the beneficiary as a skilled worker pursuant to section 203(b)(3) of the Act. Counsel further argues that the beneficiary meets the requirements set forth on the labor certification and that the petitioner submitted sufficient evidence of its ability to pay the beneficiary the proffered wage.

In pertinent part, section 203(b)(2) of the Act 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 U.S. academic or professional degree or a foreign equivalent degree above the baccalaureate level.

8 C.F.R. § 204.5(k)(2) permits the following substitution for an advanced degree:

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.

The petitioner initially indicated on the petition that it sought to classify the beneficiary as an alien of extraordinary ability pursuant to section 203(b)(1)(A) of the Act. The petitioner, however, submitted an approved labor certification, not required of aliens of extraordinary ability. On March 4, 2002, the director advised the petitioner of the requirements for aliens of extraordinary ability and offered the petitioner the option of amending the petition to seek a lesser classification. In response, counsel requested that the petition be amended to seek classification as a member of the professions holding an advanced degree or an alien of exceptional ability.

On the labor certification, Box 14, the petitioner indicated that the minimum education and training for the position was a bachelor's degree or foreign equivalent plus two years of experience. The director concluded that because a bachelor's degree plus two years of experience is not equivalent to an advanced degree, the position did not require an advanced degree. On appeal, counsel does not challenge this conclusion and requests that the petition be amended a second time to seek classification as a skilled worker pursuant to section 203(b)(3) of the Act.

Neither the law nor the regulations require the director to consider lesser classifications if the petitioner does not establish the beneficiary's eligibility for the classification requested. By offering

the petitioner the initial opportunity to amend the petition, the director already afforded the petitioner an extra opportunity to clarify the classification sought. We cannot conclude that the director committed reversible error by adjudicating the petition under the classification requested by the petitioner. There are no provisions permitting the petitioner to amend the petition on appeal in order to establish eligibility under a lesser classification. Thus, we must dismiss the appeal on this ground alone. Nevertheless, we will consider the remaining issues.

In his request for additional documentation, the director also requested evidence that the beneficiary had the requisite education and experience as listed on the labor certification. In response, the petitioner submitted the beneficiary's "Titulo de Licenciada en Ciencias de la Comunicacion." The petitioner also submitted an evaluation concluding that the licenciada is equivalent to a U.S. bachelor's degree in Mass Communications. Regarding the beneficiary's work experience, the petitioner submitted a notice of change in employee status reporting the temporary lay off of the beneficiary from Wave Publications on February 9, 1996, earning statements from Wave Publications from July 1995 through February 1996, and a letter from Diego Petersen, a sub-director at Siglo 21 confirming the beneficiary's employment for that company for an unspecified period.

The director concluded that the petitioner had not demonstrated that the beneficiary had an advanced degree or a bachelor's degree plus five years of progressive experience. Thus, the director determined that the beneficiary did not qualify as an advanced degree professional.

On appeal, the petitioner submits another letter from [REDACTED] asserting that the beneficiary worked for Siglo 21 from June 1992 to July 1994. The beneficiary's 13 months with Siglo and eight months with Wave Publications totals less than two years. While the beneficiary claims on her Form ETA-750B that she has worked for the petitioning company since April 1996, the record does not support that assertion. Even if the record did establish that the beneficiary has worked for the petitioner since April 1996, the beneficiary would still have had only 42 months of experience as of the priority date of the petition. Nor has the petitioner established that the beneficiary's experience was progressive. Thus, even if the beneficiary meets the requirements of the labor certification, the petitioner has not demonstrated that the beneficiary is an advanced degree professional.

Finally, the director requested evidence of the petitioner's ability to pay the beneficiary the proffered wage. In response, counsel asserted that such information would be forthcoming. The director determined that the petitioner had not satisfactorily addressed this issue in its response. Although not cited by the director, 8 C.F.R. § 103.2(b)(11) provides that evidence submitted in response to a request for additional evidence must be submitted at one time and that a submission of part of the evidence requested will be considered a request for a decision based on the evidence of record. Thus, the director did not err by failing to wait for an additional submission.

On appeal, the petitioner submits a letter from the Chief Financial Officer of the petitioning company asserting that it has more than 100 employees and that it had the ability to pay the beneficiary the proffered wage as of the priority date and continues to have such ability. While the director's failure to wait for an additional submission was not in error, the petitioner has now

overcome the lack of evidence regarding its ability to pay the beneficiary the proffered wage. Nevertheless, as stated above, the petitioner has not demonstrated that the job requires an advanced degree professional or that the beneficiary qualifies as an advanced degree professional.

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 sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.