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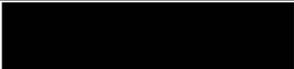


U.S. Citizenship
and Immigration
Services



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FILE:



Office: TEXAS SERVICE CENTER

Date: FEB 23 2007

SRC 03 110 50129

IN RE:

Petitioner:



Beneficiary:

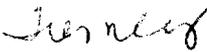
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a laboratory and lab-research facility. It seeks to employ the beneficiary permanently in the United States as a research assistant level II. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and that the beneficiary met the education requirements of the labor certification at the time of priority date, January 29, 2001. Therefore, the director denied the petition.

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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's November 22, 2004 denial, the issues in this case are whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence and whether or not the beneficiary met the education requirements of the labor certification at the time of the priority date.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). The priority date in the instant petition is January 29, 2001. The proffered wage as stated on the Form ETA 750 is \$28,000 annually (35 hour workweek).

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. Relevant evidence submitted on appeal includes a brief from counsel, copies of the petitioner's 2001 through 2003 Forms 1120, U.S. Corporation Income Tax Returns, copies of the beneficiary's 2001 through 2003 Forms W-2, Wage and Tax Statements, and copies of the petitioner's 2002 and 2003 unaudited financial statements. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2001 through 2003 Forms 1120 reflect taxable incomes before net operating loss deduction and special deductions of \$3,020, \$3,340, and \$7,520, respectively. The petitioner's 2001 through 2003 Forms 1120 also reflect net current assets of -\$435, \$986, and \$11,986, respectively.

The beneficiary's 2001 through 2003 Forms W-2, issued by the petitioner for the beneficiary, reflect wages earned by the beneficiary of \$28,000, \$30,000, and \$32,000, respectively.

The petitioner's 2002 and 2003 financial statements,² although unaudited, corroborate the figures presented on the petitioner's 2002 and 2003 income tax returns.

On appeal, counsel alleges that the petitioner has established its ability to pay the proffered wage of \$28,000 based on the fact that the petitioner has been paying the proffered wage from the priority date and continuing to the present.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner submitted copies of the beneficiary's 2001 through 2003 Forms W-2 showing that the beneficiary earned wages of \$28,000, \$30,000, and \$32,000, respectively, in those years. Since the petitioner has shown that it employed the beneficiary at a salary

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

² Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

equal to or greater than the proffered wage of \$28,000, the petitioner has established its ability to pay the proffered wage of \$28,000 from the priority date of January 29, 2001 and continuing to the present.

The second issue in this case is whether or not the petitioner has established that the beneficiary met the education requirements at the time of filing the petition or January 29, 2001.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on January 29, 2001.

The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal. On appeal, counsel submits an evaluation by [REDACTED] dated April 9, 1998, stating that "in summary, it is the judgment of [REDACTED], International Education Consultants, that [REDACTED] has the equivalent of the U.S. degree of Doctor of Medicine earned at a regionally accredited institution of higher education in the United States." Counsel also resubmits a copy of the beneficiary's "Degree of Academic Baccalaureate Graduate" from *El Colegio Tolimense*, Tolima, Colombia and copies of the beneficiary's transcripts/certificate of studies (in the original Spanish and translated into English) from the medical school that he attended: *Fundacion Escuela de Medicina* [REDACTED]. Also included in the record are the following documents which the petitioner submitted with the petition: an official transcript from the beneficiary's medical school in Colombia with English translation; a copy of the beneficiary's medical degree with English translation.

On appeal, counsel claims that the "beneficiary has fulfilled all the minimum requirements for the job position." Counsel indicates that after completing high school, [REDACTED] studied six years at *Fundacion Escuela de Medicina* [REDACTED] in Colombia, and he received a diploma in Medicine and General Surgery. Counsel states that "his diploma was evaluated by [REDACTED] on April 9, 1998 (See Exhibit 1). A letter of prior experience on behalf of the beneficiary is attached as Exhibit 2. The evaluation apparently was submitted to the Texas Service Center as part of the record."

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon 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. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of research assistant level II. In the instant case, item 14 describes the requirements of the proffered position as follows:

- | | | |
|-----|-------------------------|----------------|
| 14. | Education | |
| | Grade School | |
| | High School | - |
| | College | X |
| | College Degree Required | Bachelor's |
| | Major Field of Study | Any discipline |

The applicant must also have one year of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A reflects that there are no other special requirements for the proffered position.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 11, eliciting information about schools, colleges and universities attended, including trade or vocational training, the beneficiary represented that he attended the Escuela De Medicina [REDACTED], in Colombia from November 1985 through December 1993 and was awarded a general physician and surgeon diploma.

Regarding the beneficiary's qualifications, the record also includes a letter dated January 23, 2003 from the petitioning corporation signed by [REDACTED], Pathologist and Medical Director, that states that the beneficiary served in the proffered position from December 1998 until the date that letter was signed. This letter identifies the specific duties of the beneficiary. The copies of the beneficiary's Forms W2 issued by the petitioner for the years 2001, 2002 and 2003 submitted into the record serve to corroborate the statements made by [REDACTED] in this letter. Thus, the petitioner has established that the beneficiary has the requisite one year of experience in the proffered position.

It is noted that counsel initially indicated on the Form I-140 that the petition should be approved for an "outstanding professor or researcher." In response to the director's request for evidence dated August 23, 2004, counsel indicated that his office had committed an error when completing the Form I-140 and asked that he be allowed to correct that error and that the director process the petition as a filing for a "skilled worker or professional." In her decision dated November 22, 2004, the director indicated that in her discretion that she would allow the petition to be processed under this alternate category of "skilled worker or professional", as it appears on the Form I-140 at part 2 (1)(e). Thus, this office shall, in keeping with the director's decision, view the petition as a filing for a "skilled worker or professional."

The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(C) is clear in allowing only for the equivalency of one foreign degree to a United States baccalaureate, not a combination of degrees, diplomas or employment experience. In the instant case, the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 which, in this case, includes a bachelor's degree with a major in any discipline.

A bachelor's degree is generally found to require four (4) years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). The combination of education and experience, a combination of degrees, or certificates which, when taken together, equals the same amount of coursework required for a U.S. baccalaureate degree may not be accepted in lieu of a four-year degree.

CIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

As stated in 8 C.F.R. § 204.5(l)(3)(ii)(C), to qualify as a professional, the petitioner must submit evidence showing that the alien beneficiary holds a United States baccalaureate degree or a foreign equivalent degree and evidence that the alien is a member of the professions. In this case, the bachelor's degree may be in any discipline.

In the instant case, the beneficiary possesses a six-year degree in medicine and general surgery. Reliable evidence submitted with the petition such as official transcripts from the beneficiary's medical school, with translations, and copies of the beneficiary's medical degree, with translation, demonstrated this. The degree in medicine is the one that was evaluated by [REDACTED] and the one that the petitioner appears to claim qualifies the beneficiary for the position in accordance with the labor certification.

The AAO finds that the beneficiary's six-year degree from the *Fundacion Escuela de Medicina* [REDACTED] is at least the equivalent, if not more advanced, than the four-year U.S. baccalaureate degree.

The beneficiary's subsequent years of experience in the field of medical research assistant as documented in the record is sufficient evidence that the beneficiary is a member of the professions.

The petitioner has established that as of the priority date the beneficiary possessed the requisite qualifications for the proffered position as a professional research assistant level II as set out by the terms of 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 sustained that burden. Accordingly, the previous decision of the director will be withdrawn, and the petition will be approved.

ORDER: The director's decision of November 22, 2004 is withdrawn. The appeal is sustained, and the petition is approved.