



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

B5



FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: **DEC 04 2009**
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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:
[REDACTED]

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a communications network. It seeks to employ the beneficiary permanently in the United States as an applications engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).¹ The petition is accompanied by a Form ETA 9089, Application for Permanent Employment Certification, which was certified by the Department of Labor. The Form ETA 9089 indicates in Block H that the minimum education and experience level necessary for the position is a bachelor's degree plus two years of experience.

The director determined that the Form ETA 9089 failed to demonstrate that the job requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability and, therefore, the beneficiary cannot be found qualified for classification as a member of the professions holding an advanced degree or an alien of exceptional ability. 8 C.F.R. § 204.5(k)(4).

On appeal, counsel argues that, since the petitioner marked the box for the third preference category on the Form I-140, U.S. Citizenship and Immigration Services (USCIS) should have considered the petition under the classification for professionals or skilled workers under section 203(b)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A), even though both counsel and the petitioner indicated at the time of filing, and upon the rejection of the beneficiary's Form I-485, that the 2nd preference category was being sought.

The record shows that the appeal is properly filed and timely. 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 It is noted that the instant petition was accompanied by a cover letter signed by the president of the petitioner, [REDACTED], in which [REDACTED] indicates on both page 1 and page 2 that the petition is for a "2nd Preference Immigrant Visa Petition." Although the petitioner indicated that it was petitioning for the third preference category on the Form I-140, previous counsel to the petitioner sought to clarify the petitioner's intent upon the rejection of the beneficiary's Form I-485 package by sending a letter dated March 14, 2007 in which counsel clearly confirms that the petitioner is applying for the second preference classification. This clarification resulted in the acceptance of the Form I-485 package on March 30, 2007. As both the petitioner's president and prior counsel represented on multiple occasions, including at the time of filing, that the 2nd preference was being sought, the Nebraska Service Center's use of discretion to treat the petition as one being for that visa classification was not in error. USCIS is not considering counsel's March 14, 2007 letter to be a request for a change, material or otherwise, from the third preference category to the second preference category. Rather, as noted by counsel in the letter, counsel simply clarified that the petitioner's president clearly intended to file for the second preference category at the time the petition was filed.

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 United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "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." *Id.*

Section 203(b)(2) of the Act also includes aliens "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." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered."

Here, the Form I-140 was filed on December 18, 2006. As noted *supra*, the petitioner indicated that it was filing the petition for a member of the professions holding an advanced degree or an alien of exceptional ability.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 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. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal. On appeal, counsel submits a brief in which she argues that USCIS should have considered the petition under the classification for professionals or skilled workers under section 203(b)(3)(A) of the Act.

The regulation at 8 C.F.R. § 204.5(k)(4) states in pertinent part that "[t]he job offer portion of an 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 of an alien of exceptional ability."

In this case, the job offer portion of the Form ETA 9089 indicates that a bachelor's degree plus two years of experience is the minimum level of education and experience for the position. Accordingly, the job offer portion of the Form ETA 9089 does not require a professional holding an advanced degree or the equivalent of an alien of exceptional ability. It is noted that the petitioner and prior counsel repeatedly requested classification as a member of the professions holding an advanced degree or an alien of exceptional ability. Especially important, the petitioner's president requested this classification at the time the petition was filed. The Nebraska Service Center did not act inappropriately by exercising its discretion to treat the petition as one being for the second preference category and not for the third preference category. In this matter, the appropriate remedy would be to file another petition with the proper fee and required documentation.

The evidence submitted does not establish that the Form ETA 9089 requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability, and the appeal must be dismissed.

Furthermore, the record is devoid of the necessary initial evidence establishing that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date, i.e., April 12, 2006. 8 C.F.R. § 204.5(g)(2). The record does not contain audited financial statements, tax returns, or annual reports containing pertinent financial data relating to the petitioner's ability to pay the proffered wage on or after the priority date. Accordingly, the petition may not be approved for this additional reason.

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 met that burden.

ORDER: The appeal is dismissed.