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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

Date: SEP 19 2011 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: 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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a manufacturing of microwave components business. The director determined that the petitioner seeks to employ the beneficiary permanently in the United States as an engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The petition is accompanied by a Form ETA 750, Application for Permanent Employment Certification, which the Department of Labor certified.

The director found that the job does not require a professional holding an advanced degree. 8 C.F.R. § 204.5(k)(4). The director also determined that the petitioner did not demonstrate that the beneficiary possesses a bachelor's degree and thirty years of experience in the job offered of engineer or three years of experience as a CAD designer or export agent as required by the Form ETA 750. The director additionally found that the petitioner failed to demonstrate its ability to pay the beneficiary the proffered salary of $95,680.00 from the priority date of March 17, 2003 onwards. The director denied the petition.

On appeal, counsel argues that the beneficiary possessed the equivalent to a U.S. bachelor's degree and five years of post-baccalaureate progressive work experience. Counsel does not acknowledge that the position, as listed on the alien employment certification, allows for less than a bachelor's degree plus five years of post-baccalaureate progressive work experience.

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.*

Here, the petitioner filed the Form I-140 on December 4, 2007. On Part 2.d. of the Form I-140, the petitioner indicated that it was filing the petition for a member of the professions holding an advanced degree. The petitioner also signed the Form I-140 under penalty of perjury, certifying that "this petition and the evidence submitted with it are all true and correct."

The regulation at 8 C.F.R. § 204.5(k)(4) states in pertinent part that "[t]he job offer portion of an individual alien employment 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 750 indicates that the minimum level of education required for the position is a five-year bachelor's degree in electronic machines. The alien

employment certification also indicates that either thirty years of experience in the job offered of engineer are required or that three years of experience as a CAD designer or export agent is required.

If anything less than a bachelor's degree and five years of post-baccalaureate progressive work experience is acceptable, the job does not require an advanced degree professional. 8 C.F.R. § 204.5(k)(2). The evidence submitted does not establish that the ETA Form 750 requires a professional holding an advanced degree. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to United States Citizenship and Immigration Services requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Comm'r 1988).

The AAO additionally finds that the beneficiary does not meet the job requirements on the Form ETA 750. The beneficiary does possess a five-year bachelor's degree in mechanical engineering with a specialty in semiconductor and vacuum machine building from the Moscow Institute of Electronic Machine Building in 1970.

The petitioner submitted a letter from the Moscow Institute of Electronic Machine Building stating that the beneficiary worked there from December 1974 to December 1991 as a senior engineer. This information is the same as the information the beneficiary listed on the alien employment certification. However, the work record card that the petitioner submitted regarding the beneficiary's work experience in Russia states that the beneficiary worked both as a senior engineer and as a senior researcher during that period. Notably, the card states that the beneficiary began working as a senior researcher as early as May 1977. The petitioner also submitted a second letter from the Moscow Institute of Electronic Machine Building stating that the beneficiary worked there from January to March 1992 as a chief of sector. This information corresponds with the work record card, which states that the position was for a sector manager. However, the beneficiary failed to list this position on the alien employment certification. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

> It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The AAO notes that the petitioner has failed to document the beneficiary's work experience in the United States from 1997 onwards according to 8 C.F.R. § 204.5(g)(1), including the beneficiary's claimed experience as a manager from August 1997 to November 2002. The petitioner has also failed to provide letters documenting the beneficiary's claimed work experience from March 1992 to August 1997 or from September 1970 to November 1973 as an engineer. The petitioner has additionally failed to document any of the beneficiary's experience as a CAD designer or export agent.

The petitioner has failed to demonstrate that the beneficiary possesses thirty years of experience as an engineer or three years of experience as a CAD designer or export agent.

In addition, the regulation at 8 C.F.R. § 204.5(g)(2) states:

> *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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner had originally submitted evidence in the form of Internal Revenue Service (IRS) W-2 Wage and Tax Statements regarding the wages that it paid the beneficiary from the priority date in 2003 onwards. The director noted that the petitioner had failed to demonstrate that it had the ability to pay the beneficiary the difference between the wages paid and the proffered salary of $95,680.00 for those years in his decision.[1] On appeal, counsel failed to address the deficiencies in the evidence and failed to provide any additional information regarding the petitioner's ability to pay. Thus, the AAO finds that the petitioner has failed to demonstrate its ability to pay the beneficiary the difference between the wages paid and the proffered salary from 2003 onwards.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

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[1] The AAO notes that the director listed the incorrect amounts on the W-2s for 2003 through 2006. They were instead $38,406.64, $45,188.84, $39,535.29, and $45,202.25 respectively.