



U.S. Citizenship
and Immigration
Services

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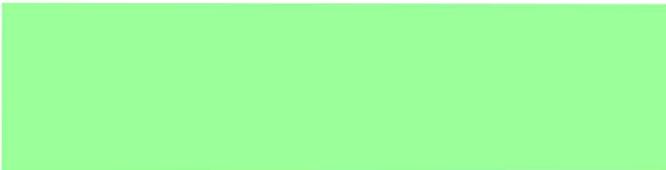


DATE: **JUL 31 2014** OFFICE: NEBRASKA SERVICE CENTER FILE: 

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:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (the director) denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be affirmed in part and withdrawn in part. The appeal will be dismissed. The petition remains denied.

The petitioner describes itself as a distributor of [REDACTED] mobile phone games. It seeks to permanently employ the beneficiary in the United States as a chief executive officer (CEO). The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

One issue in this case is whether the beneficiary possesses an advanced degree as required by the terms of the labor certification and the requested preference classification.

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).¹ The priority date of the petition is March 26, 2013.²

Part H of the labor certification states that the offered position has the following minimum requirements:

- H.4. Education: Bachelor's degree in marketing.
- H.5. Training: None required.
- H.6. Experience in the job offered: 120 months.
- H.7. Alternate field of study: International studies, business administration with concentration in marketing, or related, or any formal language studies.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: 120 months of experience in a management position in high tech, entertainment media, mobile/on-line games, or digital communications.
- H.14. Specific skills or other requirements: Management experience must include: 1) working with National and International telecommunications companies to develop technology, marketing strategies and distribution partnerships, 2) Proven experience negotiating mobile content distribution rights with major entertainment developers such as movie studios, TV, Game Developers and other related companies, 3) Increasingly responsible history of managing a start-up business, new business development, as well as product, marketing and organizational development in a fast paced industry, and 4) Strong understanding of mobile carrier sales channels, excellent relationship/partnership building skills, & proven track record of successful negotiation of revenue generating agreements.

Part J of the labor certification states that the beneficiary possesses a bachelor's degree in Portuguese-Brazilian studies from the [REDACTED] Japan, completed in

¹ See section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); see also 8 C.F.R. § 204.5(a)(2).

² The priority date is the date the DOL accepted the labor certification for processing. See 8 C.F.R. § 204.5(d).

1991. The record contains a May 31, 2000 Certificate in English, indicating that the beneficiary entered TUFSS Department of Portuguese-Brazilian studies on April 10, 1987 and graduated with a Bachelor of Arts on March 25, 1991.

The record contains an evaluation of the beneficiary's educational credentials prepared by [REDACTED] for the [REDACTED] on February 12, 2013. The evaluation states that the beneficiary's Bachelor of Arts is equivalent to a four-year Bachelor of Arts degree in Portuguese and Brazilian studies from an accredited college or university in the United States. The record also contains an evaluation of the beneficiary's educational credentials prepared by [REDACTED] for the [REDACTED] on April 28, 2008. The evaluation states that the beneficiary's Bachelor of Arts is equivalent to a four-year Bachelor of Arts degree in Portuguese and Brazilian studies from an accredited college or university in the United States. The evaluation also opines that the beneficiary's education credentials, combined with three (3) years of experience is equivalent to a bachelor's degree in marketing management from an accredited college or university in the United States.

Part K of the labor certification states that the beneficiary possesses the following employment experience:

- Manager of International Business with [REDACTED] Tokyo, Japan, from April 1, 1991 to November 30, 1998.
- Marketing Manager, Digital Communications, with [REDACTED] Tokyo, Japan, from December 1, 1998 to September 1, 1999.
- Manager of Business Development with [REDACTED] Tokyo, Japan, from September 2, 1999 to February 28, 2001.
- Manager of Business Development with [REDACTED] Tokyo, Japan, from March 1, 2001 to May 31, 2001.
- Manager of Business Development with [REDACTED] New Jersey, from June 1, 2001 to March 31, 2003.
- Director of Distribution and Licensing with [REDACTED] New Jersey, from April 1, 2003 to October 15, 2005.
- Senior VP & General Manager with [REDACTED] California, from October 21, 2005 to June 15, 2006.
- President and Chief Operating Officer with [REDACTED] California, from June 16, 2006 to April 18, 2011; and
- Chief Executive Officer (CEO) with the petitioner³ from April 19, 2011 until January 20, 2014, the date on which the labor certification was signed by the beneficiary.

The record contains an August 1, 2012 experience letter from [REDACTED], President, on [REDACTED] letterhead stating that [REDACTED] employed the beneficiary as executive staff, manager of internal business development, marketing manager, manager of business development and director of distribution and licensing from April 1991 until October 2005. The

³ The petitioner is a subsidiary of [REDACTED]

letter provides detailed descriptions and dates of employment for each of these positions with [REDACTED]. It states that the beneficiary obtained extensive management experience with [REDACTED] and its subsidiary which meets the special skills requirements of section H.14. Mr. [REDACTED] indicates that he has first-hand knowledge of the beneficiary's experience as he was employed by [REDACTED] for the duration of the beneficiary's employment with the company.

The director's decision denying the petition found that the petitioner had failed to establish that the beneficiary has the educational qualifications for the proffered position because it failed to submit a diploma or academic transcript to clearly establish the beneficiary's field of study. The director also made a finding of misrepresentation on the labor certification regarding section C.9 and the beneficiary's education.

On appeal, counsel states that there was no fraud or willful misrepresentation on the labor certification, the job opportunity is bona fide and was open to U.S. workers and the beneficiary meets the educational requirements of the labor certification.

The petitioner's appeal is properly filed, timely and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis.⁴ The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.⁵ A petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision.⁶

Eligibility for the Classification Sought

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

[A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign

⁴ *See* 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., Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

⁵ The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 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).

⁶ *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

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.

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

- (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
- (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, the job offer portion of the labor certification must require a professional holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(i).

Therefore, an advanced degree professional petition must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree. Further, an "advanced degree" is a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, *or* a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty.

While the record contains sufficient evidence that the beneficiary holds at least five years of progressive experience in the specialty, the petitioner has failed to submit an "official academic record showing that the beneficiary has a United States baccalaureate degree or a foreign equivalent degree." As stated above, the record contains a May 31, 2000 Certificate in English, indicating that the beneficiary entered [REDACTED] Department of Portuguese-Brazilian studies on April 10, 1987 and graduated with a Bachelor of Arts on March 25, 1991. There are no further education credentials contained within the record. The record does not contain the beneficiary's diploma or any transcripts. Further, it is unclear whether the certificate issued in English only is an original document or a translation of an original certificate. As such, the documentation submitted by the petition below and on appeal does not meet the requirements of 8 C.F.R. § 204.5(k)(3)(i).

The certificate contained in the record indicates that the beneficiary graduated from the Department of Portuguese-Brazilian studies of [REDACTED] with a Bachelor of Arts. According to its website, [REDACTED]

Department of Portuguese students spend the first two years of study in intensive language learning. The focus then moves from language to discipline-related seminars, which includes a wide variety of topics such as Brazilian and Portuguese societies, economics, politics and history, as well as Portuguese language and literature, cultural studies and development assistance in the Portuguese-speaking world. See www.tufs.ac.jp/english/education/ug/studies/portuguese.html (accessed July 28, 2014).⁷ Without the beneficiary's transcripts identifying her specific coursework, we are unable to determine whether the beneficiary's Bachelor of Arts meets the field of study requirements of the labor certification.

In his February 3, 2014, notice of intent to deny (NOID) the director informed the petitioner that it had failed to submit the required evidence of the beneficiary's educational credentials. The March 13, 2014 denial again informs the petitioner that the record does not contain the official academic record showing that the beneficiary has a United States baccalaureate degree or a foreign equivalent degree. On appeal, the petitioner has failed to submit the official academic record showing that the beneficiary has a United States baccalaureate degree or a foreign equivalent degree. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

After reviewing all of the evidence in the record, it is concluded that the petitioner has failed to establish that the beneficiary possessed at least a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, or a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty. Therefore, the beneficiary does not qualify for classification as an advanced degree professional under section 203(b)(2) of the Act.

The Minimum Requirements of the Offered Position

The petitioner must also establish that the beneficiary satisfied all of the educational, training, experience and any other requirements of the offered position by the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the job offer portion of the labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional

⁷ It is unclear whether [REDACTED] is an accredited university, as [REDACTED] does not appear on the [REDACTED] list of accredited universities. See [http://\[REDACTED\]](http://[REDACTED]) (accessed July 29, 2014). Accreditation provides assurance of a basic level of quality of the education provided by an institution as well as the nationwide acceptance of its degrees. An unaccredited degree does not provide a sufficient assurance of quality. While this does not form the basis of our decision, this issue must be addressed in any future filings.

requirements. *See Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification. Even though the labor certification may be prepared with the beneficiary in mind, USCIS has an independent role in determining whether the beneficiary meets the labor certification requirements. *See Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 *7 (D. Or. Nov. 30, 2006).

In the instant case, the labor certification states that the offered position requires a bachelor's degree in marketing, international studies, business administration with a concentration in marketing or related, or any formal language studies and 120 months of experience in the proffered position or in management positions in high tech, entertainment media, mobile/on-line games, or digital communications.

For the reasons explained above, the petitioner has failed to establish that the beneficiary possesses a bachelor's degree in marketing, international studies, business administration with a concentration in marketing or related, or any formal language studies.

The petitioner failed to establish that the beneficiary possessed the minimum requirements of the offered position set forth on the labor certification by the priority date. Accordingly, the petition must also be denied for this reason.

Material Misrepresentation

The director found that the beneficiary misrepresented her education credentials because the instant labor certification indicates that the beneficiary has a bachelor's degree in Portuguese-Brazilian studies and a prior labor certification filed on behalf of the beneficiary indicates that the beneficiary has a bachelor's degree in marketing.⁸ Although the fields of study listed on the labor certifications are inconsistent, counsel asserts that the beneficiary relied upon a combination of education and experience as described in the FIS evaluation, to list the field of study as Business Administration. Neither the petitioner nor the beneficiary have submitted any documentation purporting that the

⁸ Counsel correctly notes that the previous labor certification listed the beneficiary's field of study as Business Administration, rather than marketing.

beneficiary holds a single bachelor's or foreign equivalent degree in marketing. As the record supports that the beneficiary was relying upon her bachelor's degree in Portuguese-Brazilian studies and three (3) years of work experience to be the equivalent of a bachelor's degree in marketing, we find that neither the petitioner nor the beneficiary misrepresented a material fact concerning the beneficiary's education. This portion of the director's decision is withdrawn.

The director also found that the petitioner made a material misrepresentation by failing to check "yes" to C.9 of the ETA Form 9089. The ETA Form 9089 specifically asks in Section C.9: "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators, and the alien?"

In order to provide the Certifying Officer (CO) the opportunity to evaluate whether a job opportunity has been and is clearly open to qualified U.S. workers, an employer must disclose any ownership interest or familial relationship(s) between the foreign worker and the owners, stockholders, partners, corporate officers, and incorporators by marking "yes" to Question C.9 on the ETA Form 9089. *See also Matter of Modular Container, 1989-INA-228 (Jul. 16, 1991) (en banc).*

On July 28, 2014, the DOL posted the following to its Frequently Asked Questions (FAQ):

A familial relationship includes any relationship established by blood, marriage, or adoption, even if distant. For example, cousins of all degrees, aunts, uncles, grandparents and grandchildren are included. It also includes relationships established through marriage, such as in-laws and step-families. The term "marriage" will be interpreted to include same-sex marriages that are valid in the jurisdiction where the marriage was celebrated. . . Please note that failure to disclose familial relationships or ownership interests when responding to Question C.9 is a material misrepresentation and may therefore be grounds for denial, revocation or invalidation in accordance with the Department's regulations.

The petitioner identified on the ETA Form 9089 that it was an entity with 15 employees, and checked "no" to section C.9. Documentation in the record reflects that the petitioner is a wholly owned subsidiary of [REDACTED] a company whose stocks are publicly traded. There is no evidence that the beneficiary has any ownership interest in the petitioner or the petitioner's parent company, or that the beneficiary has a familial relationship with any owner, stockholder, partner, cooperate officer or incorporator. The beneficiary's position as a corporate officer of the petitioner is not an interest or relationship identified in section C.9 of the ETA Form 9089. Therefore, neither the petitioner nor the beneficiary misrepresented any familial relationship with or ownership interest in the petitioner. This portion of the director's decision is withdrawn.

As the record does not demonstrate the either the petitioner or the beneficiary willfully misrepresented any material fact, the labor certification is reinstated and this portion of the director's decision is withdrawn.

In summary, the petitioner failed to establish that the beneficiary possessed an advanced degree as required by the terms of the labor certification and the requested preference classification. Therefore, the beneficiary does not qualify for classification as a member of the professions holding an advanced degree under section 203(b)(2) of the Act. The director's decision denying the petition is affirmed.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition remains denied.

FURTHER ORDER: The alien employment certification, Form ETA 9089, ETA case number [REDACTED] is reinstated.