



U.S. Citizenship  
and Immigration  
Services

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[REDACTED]

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: JUN 02 2008  
SRC 06 199 51003

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.

*Maig Jensen*

2 Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision; however, because the petition is not approvable, it is remanded for further action and consideration.

The petitioner is a cellular network engineering products and consulting services company. It seeks to employ the beneficiary permanently in the United States as a senior radio frequency engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the job did not require a member of the professions holding an advanced degree.

On appeal, counsel asserts that the director's decision is inconsistent with the decision in *Chintakuntla v. INS*, No. C99-5211MMC (N.D. Cal. 2000). Counsel further asserts that experience in the beneficiary's field is presumptively progressive. For the reasons discussed below, we withdraw the director's basis of denial. Nevertheless, the petitioner did not support this petition with any evidence of its ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2). Thus, we must remand the matter to the director for an inquiry into the petitioner's ability to pay 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. The equivalent of an advanced degree is either a U.S. baccalaureate or foreign equivalent degree followed by at least five years of "progressive experience" in the specialty. 8 C.F.R. § 204.5(k)(2).

The beneficiary's eligibility as a member of the professions with the equivalent of an advanced degree is not in dispute; the beneficiary holds a baccalaureate degree in a field relevant to the position sought and has more than five years of progressive experience. The issue is whether the job requires a member of the professions holding an advanced degree. The key to this determination is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

In this matter, Part H, line 4, of the labor certification reflects that a bachelor's degree is the minimum level of education required. Line 6 reflects that experience in the job offered is not required. Line 8 reflects that no combination of education and experience in the alternative is acceptable. Line 9 reflects that a foreign educational equivalent is acceptable. Finally, line 10 reflects that experience in an alternative occupation is acceptable. Line 10-A provides that five years of such experience is required. Line 10-B, which asks the employer to list the job title of the acceptable alternate occupation, reference line 14, which states: "5 (five) years experience with GSM and cellular network planning and implementation."

On June 27, 2006, the director requested evidence that the position required five years of post-baccalaureate experience. In response, counsel noted the job requirements at lines 10 and 14. The petitioner also submitted a letter from its president asserting that the experience required, when viewed in the light of the position's duties, is progressive and advanced. The petitioner also submitted a 2000 memorandum from William Yates, Deputy Executive Associate Commissioner, Office of Field Operations, entitled *Educational and Experience Requirements for Employment-Based Second Preference (EB-2) Immigrants*, HQ 70/6.2. This memorandum states that it is "reasonable to infer that highly technical positions are progressive in nature due to the constant state of change in their respective industries" although every petition must be decided on a case-by-case basis.

In denying the petition, the director stated that the description of the required experience "does not mandate that the work experience be of a progressively difficult nature." On appeal, counsel reiterates the assertions made in response to the request for additional evidence.

We are satisfied that five years of experience in GSM and cellular planning and implementation is inherently progressive.

The petitioner has satisfactorily shown that this position, at a minimum, requires a professional holding the equivalent of an advanced degree. The petitioner, however, did not submit any evidence relating to its ability to pay the proffered wage in support of this petition.

Therefore, this matter will be remanded. The director must request evidence relating to the petitioner's ability to pay the proffered wage and issue a new decision. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.