



U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED]  
LIN 07 196 52289

Office: NEBRASKA SERVICE CENTER

Date: DEC 04 2009

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).

Petty Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, who also subsequently denied a motion to reopen/reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software consultancy firm. It seeks to employ the beneficiary permanently in the United States as a programmer analyst 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 Alien Employment Certification, which was certified by the Department of Labor.

The director determined that the Form ETA 750 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). The director denied the petition accordingly. The director also subsequently denied the petitioner's motion to reopen/reconsider the denial of the petition.

On appeal, counsel argues that the petitioner sought classification as an advanced degree professional or alien of exceptional ability in error by mistakenly checking block "d" in Part 2 of the Immigrant Petition for Alien Worker (Form I-140). Counsel asserts that the petitioner should have checked block "e" for a professional or skilled worker pursuant to section 203(b)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A).

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.

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 June 29, 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 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 he argues that a typographical error was committed in marking Part 2.d. of the I-140 and that the petitioner intended to seek classification as a professional or skilled worker. He also submits a "corrected" page 1 of the Form I-140 in which box "e" is checked.

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 750 indicates that the minimum level of education required for the position is a bachelor's degree or equivalent in computer science or engineering and that three months of experience in the job or that three months in a related occupation defined as systems analyst, systems administrator is required.<sup>1</sup> Accordingly, the job offer portion of the Form ETA 750 does not require a professional holding an advanced degree or the equivalent of an alien of exceptional ability.

Counsel asserts that the director was required to issue a request for evidence to allow the petitioner to amend the I-140 to reflect a request for a professional or skilled worker designated on Part 2, paragraph e of the I-140. The AAO does not concur. It is noted that the *Memorandum by William R. Yates, Associate Director of Operations*, "Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)," HQOPRD 70/2 (February 16, 2005), cited by counsel, is by its own terms, not intended to create any right or benefit or constitute a legally binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c), but merely offered as guidance.<sup>2</sup> It does not supersede the plain language of the regulation at 8 C.F.R. § 103.2(b)(8)(ii) which provides that if all the required initial evidence has been submitted but fails to establish eligibility, USCIS may in its discretion, deny the petition deny the petition for lack of initial evidence or for ineligibility or request additional evidence. It is noted that neither the law nor the regulations require the director to consider other

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<sup>1</sup> Item 15 (Other Special Requirements) additionally modifies the experience as requiring three months of experience in PeopleSoft, SQR, SQL and Crystal Reports on Windows NT/Unix and indicates that in lieu of three months of experience, education or training will be acceptable. Item 15 also modifies the bachelor's degree or equivalent college degree required as stating that the petitioner is willing to accept a combination of education, experience and other credentials as a degree equivalent.

<sup>2</sup> *See also*, *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968).

classifications if the petition is not approvable under the classification requested. We cannot conclude that the director committed reversible error by adjudicating the petition under the classification requested by the petitioner. Further, there are no provisions permitting the petitioner to amend the petition on appeal in order to reflect a request under another classification.

The petitioner requested classification as a member of the professions holding an advanced degree or an alien of exceptional ability and attempted to change this request to that of a skilled worker or professional on appeal. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

The evidence submitted does not establish that the Form ETA 750 requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability, and the appeal must be dismissed.<sup>3</sup>

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<sup>3</sup> It is noted that the petitioner also failed to sufficiently document the petitioner's continuing ability to pay the proffered wage of \$50,000 per year pursuant to the requirements of 8 C.F.R. 204.5(g)(2). Although the record suggests that the petitioner has employed the beneficiary since August 2004, evidence of wages paid to the beneficiary since the priority date of March 28, 2005 as established by the Form ETA 750A was not provided. The regulation at 8 C.F.R. § 204.5(g)(2) provides that a petitioner must demonstrate its continuing ability to pay the proffered wage as of the priority date until the beneficiary obtains permanent residence. USCIS reviews net income or net current assets as illustrated on tax returns, annual reports, or audited financial statements, or wages already paid to the beneficiary. The petitioner provided a federal tax return for 2005 which reflect that the petitioner is structured as an S Corporation. Where an S Corporation's income is exclusively from a trade or business, U.S. Citizenship and Immigration Services (USCIS) considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. Where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 17e (2005) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007)(indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Here, the petitioner's net income is reflected on line 17e in 2005. The net income reported in that year was \$105,331. In reviewing the petitioner's net current assets, which are derived from the difference between current assets (line(s) 1 through 6) on Schedule L of the respective federal income tax return) and current liabilities (line(s) 16 through 18), the petitioner's net current assets are shown to be -\$4,941. It is additionally noted that USCIS electronic records indicate that the petitioner has filed over 334 immigrant and non-immigrant petitions in the last few years. Where multiple beneficiaries are sponsored, the petitioner must establish that it could continually cover the proffered wage(s) of each beneficiary as of each respective priority date(s). Here, although the petitioner's net income reflects that it could cover the beneficiary's annual wage of \$50,000, this would be contingent upon a showing that it had the ability to cover the other sponsored beneficiaries as well. As the record currently stands, this assumption may not be made without more documentation relating to all sponsored beneficiaries. Therefore, the

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.

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petitioner has not sufficiently documented that it has had the continuing ability to pay the beneficiary the proffered wage. Additionally, no other circumstances such as a framework of profitability, reputation or historical growth are asserted in this case such that would overcome the factors stated herein. *See Matter of Sonegawa* 12 I&N Dec. 612 (BIA 1967). Therefore, regardless of which visa classification the beneficiary qualifies for, the record of proceeding as it currently stands does not demonstrate the petitioner's eligibility for the benefit sought.