



U.S. Citizenship
and Immigration
Services

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FILE:

[REDACTED]
LIN 07 217 54028

Office: NEBRASKA SERVICE CENTER

Date DEC 04 2009

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:

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 Blaw
Chief, Administrative Appeals Office

DISCUSSION: The preference 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 computer development and design business. It seeks to employ the beneficiary permanently in the United States as a computer system analyst. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL).¹ The director determined that the petitioner had not established that the petition requires at least a bachelor degree or equivalent and five years of experience in the job offered or five years experience in a related occupation and, therefore, that the beneficiary cannot be found qualified for classification as a member of the professions with an advanced degree. The director further determined that the petitioner had not established its continuing ability to pay the proffered wage from the priority date of December 29, 2005. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. 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.

Section 203(b)(2)(A)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides immigrant classification to qualified members of the professions holding advanced degrees or their equivalent or 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, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Here, the Form I-140 was filed with U.S. Citizenship and Immigration Services (USCIS) on July 25, 2007. On Part 2.e. 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 (who is NOT seeking a National Interest Waiver)."

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

¹ The ETA Form 9089 indicates that the position requires a Bachelor's degree in computer science and two years of experience in the job offered of computer system analyst.

Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.³

On appeal, counsel submits a brief; copies of the petitioner's 2004⁴ through 2006 Forms 1120, U.S. Corporation Income Tax Returns, for fiscal years October 1 through September 30 of each year; a copy of a USCIS Interoffice Memorandum, dated May 4, 2004, from William R. Yates, Associate Director for Operations, entitled *Determination of Ability to Pay under 8 C.F.R. § 204.5(g)(2)*; copies of the beneficiary's 2004 through 2007 Forms 1040, U.S. Individual Income Tax Returns; copies of the 2004 through 2007, Forms W-2, Wage and Tax Statements, issued by the petitioner on behalf of the beneficiary; an affidavit, dated June 3, 2008, from the beneficiary; copies of the beneficiary's Master's of Science degree in [REDACTED] Fullerton, CA with transcripts; and an employment letter, dated June 5, 2007, from Pei Wang, [REDACTED] verifying the beneficiary's employment with the Bank of China from September 1, 1998 through August 31, 1999.

Counsel claims that the petitioner has established its ability to pay the proffered wage of \$56,056 based on the actual wages paid to the beneficiary, based on its net current assets, and based on the totality of the circumstances. Counsel also states:

As for the qualifications of the beneficiary, [he] received his Master Degree in [REDACTED] in August 2004. In addition to his advanced degree in computer science, he also obtained more than 24 months related work experience prior to his employment as an H-1 holder at Logisys Computer, Inc. (See beneficiary's affidavit in Exhibit IV). Therefore, the beneficiary is well qualified to the position requiring a Bachelor's degree and 24 months experience specified in the labor certification.

The regulation at 8 C.F.R. § 204.5(k) states in pertinent part:

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 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).

⁴ It should be noted that the petitioner's 2004 tax return is for the year prior to the priority date of December 29, 2005 and has limited probative value when evaluating the petitioner's continuing ability to pay the proffered from the priority date. Therefore, the petitioner's 2004 tax return will only be considered when evaluating the totality of the circumstances affecting the petitioning business if the evidence warrants such consideration.

- (1) Any United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(2) of the Act as an alien who is a member of professions holding an advanced degree or an alien of exceptional ability in the sciences, arts or business. . . .
- (2) Definitions. As used in this section: Advanced degree means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. 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. . . .

Profession means 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.

(3) Initial evidence. The petition must be accompanied by documentation showing that the alien is a professional holding an advanced degree or an alien of exceptional ability in the sciences, the arts, or business.

(i) To show that the alien is a professional holding an advanced degree, the petition 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.

The regulation at 8 C.F.R. § 204.5(l) states in pertinent part:

(1) Any United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(3) as a skilled worker, professional, or other (unskilled) worker.

(2) Definitions. As used in this part:

Skilled worker means an alien who is capable, at the time of petitioning for this classification, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers

are not available in the United States. Relevant post-secondary education may be considered as training for the purposes of this provision.

(3)(i) Labor certification or evidence that alien qualifies for Labor Market Information Pilot Program. Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation, or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market.

(ii) Other documentation –

(A) General. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) Skilled workers. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

In this case, the ETA Form 9089, Application for Permanent Employment Certification, indicates that the proffered position requires a Bachelor's degree in Computer Science and two years of experience in the job offered of computer system analyst. However, the petitioner requested classification on Form I-140 as a "member of the professions holding an advanced degree or an alien of exceptional ability (who is NOT seeking a National Interest Waiver)."

There is no provision in statute or regulation that compels USCIS to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. 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). 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 petition requires at least a bachelor degree or equivalent and five years of experience in the job offered or five years experience in a related

⁷ Thus, to be eligible for any preference classification, both the beneficiary and the position must satisfy the minimum statutory and regulatory requirements for the classification sought. Even though the beneficiary has a Master's degree in computer science, the position, as described on the

occupation such that the beneficiary may be found qualified for classification as “a member of the professions holding an advanced degree or an alien of exceptional ability (who is NOT seeking a National Interest Waiver) worker.”⁷

Furthermore, it is noted that the letter submitted to document the beneficiary’s experience is insufficient. A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(k)(3) as an alien with an advanced degree (or if properly refiled pursuant to 8 C.F.R. § 204.5(l)(3) as a skilled worker),⁸

Initial evidence. The petition must be accompanied by documentation showing that the alien is a professional holding an advanced degree or an alien of exceptional ability in the sciences, the arts, or business.

(i) To show that the alien is a professional holding an advanced degree, the petition 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

approved Form ETA 9089, does not require a Master’s degree. Therefore, the position cannot be considered as one requiring a member of the professions holding an advanced degree or an alien of exceptional ability (who is NOT seeking a National Interest Waiver), and the petition may not be approved.

⁸ For a skilled worker, the petitioner would need to demonstrate:

(ii) *Other documentation*—

(A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

(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 the instant case, the experience letter submitted to document the beneficiary's experience is insufficient to meet regulatory requirements. Form ETA 9089 requires 24 months of experience as a computer system analyst. The experience letter submitted does not state that the beneficiary's job duties were that of a computer system analyst. Instead, the experience letter states that the beneficiary was a loan officer who:

Work Scope: Collect and analyze loan company information. Including: company ownership certificate, loan history of the borrower company, current revenue and tax return of the borrower company.

Loan Risk Checkup: Including: The goal and usage of the loan. The percentage that the loan takes in the project. Evaluate the profit that the loan will bring and the risk of the loan and how to avoid it. Track marketability and Industry trend of the project.

Loan Approval: Including: prepare all the legal document and supporting material which needed for the loan project, confirm mortgage value and cash value during the loan term. Confirm credit history of the loan guarantor and report to the loan department.

Therefore, the letter is insufficient to document that the beneficiary has the required experience for the job offered. In addition, the time the beneficiary was employed by the petitioner may only be included up to the date of the priority date. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner has not established that the beneficiary met the two years of experience in the job offered as a computer system analyst as required by the labor certification.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.⁹ 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.

⁹ The petitioner has established its ability to pay the proffered wage of \$56,056 as of the priority date of December 29, 2005 based on its net current assets in fiscal years 2005 and 2006. However, as the petitioner is currently unable to overcome the other issues as noted above, the appeal must be dismissed.