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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

DATE: AUG 23 2012

OFFICE: TEXAS 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 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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center (Director). It is now on appeal before the Chief, Administrative Appeals Office (AAO). The Director's decision will be withdrawn and the petition remanded for a new decision.

The petitioner is a sports and entertainment cablecasting company. It seeks to permanently employ the beneficiary in the United States as Associate Director of Marketing – Multicultural Markets, and to classify her 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).

The regulation at 8 C.F.R. § 204.5(k)(2) defines “advanced degree” as follows:

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.

The regulation at 8 C.F.R. § 204.5(k)(4) also provides, in pertinent part, as follows:

(i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor The job offer portion of the individual labor certification . . . must demonstrate that the job requires a professional holding an advanced degree or the equivalent

The Form I-140, Immigrant Petition for Alien Worker, was filed on June 11, 2009. The petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification, that was certified by the Department of Labor (DOL).¹

In a decision dated August 6, 2009 (but not mailed to the petitioner until September 10, 2009), the Director denied the petition on the ground that the labor certification (ETA Form 9089) does not specify that the proffered position requires an individual holding an advanced degree or the equivalent of an advanced degree. The Director concluded that the marketing position does not qualify for classification as an advanced degree professional.

The petitioner filed an appeal, Form I-290B, on October 8, 2009, supplemented by a brief from counsel and supporting documentation. Along with the Form I-290B counsel submitted a copy of the certified ETA Form 9089 that included not only a new signature of the original preparer, but also the signatures of the beneficiary and the applicant's senior corporate recruiter which counsel indicated were inadvertently omitted from the original ETA Form 9089. In the appeal brief counsel asserts that the petitioner did specify in Part H of the ETA Form 9089 that the proffered position requires an advanced degree as defined in 8 C.F.R. § 204.5(k)(4) – in particular a bachelor's degree in marketing or a related field, or a foreign educational equivalent, plus five years of experience in any

¹ The ETA Form 9089 was filed with the DOL on August 12, 2008, and certified by the DOL on April 1, 2009.

related occupation involving the U.S. Hispanic market. Since the beneficiary meets these requirements, counsel asserts, the Director's decision should be withdrawn.

The appeal is properly filed and timely and makes specific allegations of error in law or fact. The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

The job requirements for the proffered position in this case are specified by the petitioner in Part H of the ETA Form 9089. This section of the labor certification application – 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.

The job title of the proffered position is identified in Part H, Box 3, as Associate Director of Marketing – Multicultural Markets. In Boxes 4 and 4-B the minimum educational requirement is specified as a bachelor's degree in marketing or a related field. In Box 9 the petitioner stated that a foreign educational equivalent is also acceptable. In Boxes 5 and 6 the petitioner indicated that no training or experience in the "job offered" is required. In Boxes 10 and 10-B, however, the petitioner indicated that 60 months (five years) of experience in an alternate occupation – in particular, "any related occupation involving the U.S. Hispanic market" – is acceptable.

In his denial decision the Director interpreted the entries in Boxes 4, 6, and 10 as requiring either a bachelor's degree in marketing or five years of experience in an alternate occupation, but not both. Since neither a bachelor's degree nor five years of experience, viewed individually, constitutes an advanced degree under 8 C.F.R. § 204.5(k)(4), the Director concluded that the proffered position in this case could not be classified as an advanced degree professional.

The AAO does not agree with the Director's interpretation of the labor certification. After reviewing the materials submitted on appeal, the AAO agrees with counsel's contention that the entries in Boxes 4, 6, and 10 of Part H require both a bachelor's degree and five years of experience in an alternate occupation to qualify for the proffered position. Since the educational and experience components, in combination, constitute an advanced degree within the definition of 8 C.F.R. § 204.5(k)(4), the proffered position qualifies for classification as an advanced degree professional under section 203(b)(2) of the Act.

Thus, the petitioner has overcome the ground for denial in the Director's decision. Accordingly, the Director's decision will be withdrawn.

To be eligible for approval as an advanced degree professional, the beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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 submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

See Matter of Wing's Tea House, 16 I&N 158 (Act. Reg. Comm. 1977). The petitioner must also establish its continuing ability to pay the proffered wage from the priority date onward. *See* 8 C.F.R. § 204.5(d). The priority date is the date the labor certification application was accepted for processing by the DOL. *Id.*³ The priority date in this case is August 12, 2008. The “offered wage” of the subject position, as stated in Box G of the ETA Form 9089, is \$114,500 per year.

The Director made no findings in his decision as to whether the beneficiary satisfied the education and experience requirements of the labor certification, and whether the petitioner has established its continuing ability to pay the proffered wage.

Therefore, the petition will be remanded to the Director for the consideration of these issues, and any other issue the Director deems appropriate. The Director may request additional evidence from the petitioner, if needed, and the petitioner may submit additional evidence within a reasonable time period to be set by the Director. The Director will then issue a new decision.

As always in visa petition proceedings, the burden of proof rests entirely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The Director’s decision dated August 6, 2009 is withdrawn. The petition is remanded to the Director for the issuance of a new decision.

³ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad.