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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: **FEB 08 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). The petition 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 The Director's decision will be withdrawn and the petition remanded for a new decision.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 an internet infrastructure applications development company. It seeks to permanently employ the beneficiary in the United States as a computer software engineer, applications III, and to classify him 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). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the Department of Labor (DOL), accompanied the petition.¹

In a decision dated March 5, 2009, the Director denied the petition on two grounds: (1) 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, and (2) the petitioner failed to establish that the beneficiary meets the requirements for the position as set forth on the labor certification. The Director concluded that the beneficiary was ineligible for classification as an advanced degree professional.

On appeal, counsel asserts that petitioner did specify on the ETA Form 9089 – at Part H, Box 14 – that the proffered position requires the equivalent of an advanced degree. Counsel also resubmits documentary evidence that the beneficiary meets the educational and experience requirements for the position as stated in the ETA Form 9089. The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 f.3d 143, 145 (3d Cir. 2004).

Section 203(b)(2) of the Act provides for 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. 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

¹ The ETA Form 9089 was filed with the DOL on October 26, 2007 (the priority date), and certified by the DOL on December 4, 2007.

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 Computer Software Engineer III. In Boxes 4, 4-B, 7, and 7-A the minimum educational requirements are specified as a bachelor's degree in computer science, applied mathematics, electrical engineering, or a related field. In Box 9 the petitioner stated that a foreign educational equivalent is also acceptable. In Boxes 6 and 10 the petitioner indicated that no experience in the job offered was required for the job, and that experience in an alternate occupation was not acceptable. In Box 14, however, the petitioner specified that "five years of experience in the following areas" was required, and then proceeded to provide a long list of computer-related programs, applications, and methodologies.

The documentation of record – including a diploma and academic transcript from Moscow State Engineering Physics Institute (Technical University) – shows that the beneficiary entered the technical university in 1988 and upon completion of his studies in 1994 was awarded a diploma in the specialty of applied mathematics and recognized as an applied mathematics engineer.

The record also includes evidence of the beneficiary's work experience prior to August 16, 2005 (when his employment with the petitioner commenced) in the form of letters from two previous employers. One letter, from the general manager of [REDACTED] dated October 8, 2007, states that the beneficiary was employed as a Senior Software Engineer from April 2000 to April 2004. The letter discussed his job duties in detail. The second letter, dated September 24, 2007, is from the general director of [REDACTED] an affiliate of the petitioner located in Moscow. This letter states that the beneficiary was employed from April 1, 2004 until August 15, 2005 as a Research and Development Manager and listed his job duties in detail.

In his decision the Director evidently focused on the petitioner's entries in Boxes 6 and 10 (in Part H of ETA Form 9089), and overlooked the petitioner's entry in Box 14. The Director concluded that the labor certification did not require any work experience to go along with the requisite bachelor's degree, which would mean that the combined education and experience requirements did not amount to those of an advanced degree professional as defined in 8 C.F.R. § 204.5(k)(4). The Director did not explain the basis of his other finding that the beneficiary did not fulfill the requirements of the labor certification.

The AAO agrees with counsel's arguments on appeal. The ETA Form 9089, read as a whole, requires not only a bachelor's degree in computer science, applied mathematics, electrical engineering, or a related field, but also five years of progressive computer-related work experience. As such, the labor certification requires an advanced degree professional as defined in 8 C.F.R. § 204.5(k)(4). In addition, the AAO determines that the beneficiary's diploma in applied mathematics from the Technical University in Moscow and more than five years of experience in the computer field at [REDACTED] fulfill the requirements of the proffered position set forth in the ETA Form 9089.

Based on the foregoing analysis, the AAO determines that the petitioner has overcome the grounds for denial in the Director's decision. Accordingly, the Director's decision of March 5, 2009, denying the petition, will be withdrawn.

However, the petition is not approvable as the record does not contain evidence of the petitioner's continuing ability to pay the proffered wage from the priority date up to the present, in accordance with 8 C.R.R. § 204.5(g)(2). Therefore, the petition will be remanded to the Director for the consideration of this issue, and any other issue the Director deems appropriate. 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 of March 5, 2009 is withdrawn. The petition is remanded to the Director for the issuance of a new decision.