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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Service  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



DATE: **OCT 31 2013** OFFICE: NEBRASKA 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. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

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,

  
Ron Rosenberg  
Chief, Administrative Appeals Office

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 The director's decision will be withdrawn and the petition remanded for a new decision.

The petitioner is a semiconductor development and sales company. It seeks to permanently employ the beneficiary in the United States as an electronic design engineer, 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).

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 April 24, 2013. The petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification that was certified by the Department of Labor (DOL).<sup>1</sup>

In a decision dated June 17, 2013, the director denied the petition on the ground that the labor certification (ETA Form 9089) does not qualify for classification as an advanced degree professional. Specifically, the director determined that the petitioner's inclusion of the statement "will accept educational equivalency evaluation prepared by qualified credentials evaluation service" in section H.14 of the Form 9089 indicates that the petitioner will accept less than a master's degree or a bachelor's degree with five (5) years of progressive, post-baccalaureate experience for the offered position.

The appeal is properly filed, 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

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<sup>1</sup> The ETA Form 9089 was filed with the DOL on November 29, 2012, and certified by the DOL on March 11, 2013.

upon appeal.<sup>2</sup> On appeal, counsel submits a brief and copies of documentation already in the record. Counsel contends that the director's basis for denial is without merit. Counsel contends that the beneficiary possesses all of the required qualifications for the proffered position.

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 electronic design engineer. In the instant case, the labor certification states that the offered position has the following minimum requirements:

- H.4. Education: Master's degree in electrical engineering or a related technical field.
- H.5. Training: None required.
- H.6. Experience in the job offered: 24 months.
- H.7. Alternate field of study: Electrical engineering or a related technical field.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: 24 months in occupations in IC or analog/digital transistor-level circuit design.
- H.14. Specific skills or other requirements: Education or experience background must include: 1) CMOS PLL design: design and layout of analog and some digital transistor level circuits; 2) simulation models, design rules, verification procedures (DRC/LVS/ERC) and back-annotation of parasitic; 3) Cadence tools and related lab equipment. Experience may be gained concurrently. Employer will accept educational equivalency evaluation prepared by qualified credentials evaluation service.

In his denial the director interpreted the entries in sections H.8 and H.14 as requiring less than an advanced degree or foreign equivalent. Since the petitioner indicated that it would not accept an alternate combination of a bachelor's degree and five (5) years of experience, 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 Sections H.4, 6, 10 and 14 meet the minimum requirements for the position to be classified as an advanced degree professional. Since the educational component alone constitutes 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.

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<sup>2</sup> 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).

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. *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.* The priority date in this case is November 29, 2012. The "offered wage" of the subject position, as stated in Section G of the ETA Form 9089, is \$78,500.00 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.<sup>3</sup>

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 June 17, 2013 is withdrawn. The petition is remanded to the director for the issuance of a new decision.

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<sup>3</sup> It is noted that representations made on the certified ETA Form 9089, which is signed by both the petitioner and the beneficiary under penalty of perjury, clearly indicate that, to the extent that the duties are substantially comparable, the beneficiary's experience with [REDACTED] cannot be used to qualify the beneficiary for the certified position. [REDACTED] is a remote location for the petitioner's company. In response to question J.21, which asks, "Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?," the petitioner answered "no." The petitioner specifically indicated in response to question H.10 that experience in the alternate occupations in IC or analog/digital transistor-level circuit design are accepted; however, in reviewing the job description for the beneficiary's position as design engineer provided on the labor certification and in experience letters and the beneficiary's resume, the duties are substantially comparable to the job duties of the proffered position. In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not substantially comparable and the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. Here, the beneficiary indicates in response to question K.1. that his position with [REDACTED] was as a design engineer and the job duties are substantially comparable to the job duties of the position offered. Therefore, pursuant to 20 C.F.R. § 656.17(i)(5)(i) the petitioner must demonstrate that the experience gained with Integrated Device Technology (Shanghai) Co. Ltd. was with a different entity than the petitioner.