



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: AUG 04 2014

OFFICE: NEBRASKA SERVICE CENTER FILE

[Redacted]

IN RE:

Petitioner:

Beneficiary:

[Redacted]

PETITION: Immigrant Petition for 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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) 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.

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was initially approved by the Director, Nebraska Service Center. On further review of the record, the director determined that the beneficiary was not eligible for the benefit sought. The director served the petitioner with a Notice of Intent to Revoke (NOIR) the approval of the preference visa petition. The director subsequently revoked approval of the petition. The director also dismissed the petitioner's motion to reopen and reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded for further investigation and review.

The petitioner describes itself as an IT Solutions Provider. It seeks to employ the beneficiary permanently in the United States as a information systems security engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to aliens of exceptional ability¹ and members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, an ETA Form 9089 Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition.²

The Form I-140, Immigrant Petition for Alien Worker was filed on March 15, 2012. It was initially approved on August 9, 2012. Upon further investigation, the director issued a NOIR raising issues about the beneficiary's work experience required by the ETA Form 9089 and the petitioner's ability to pay the proffered wage of \$104,874. The director subsequently revoked the petition's approval on April 25, 2013. He determined that the petitioner had not established that the beneficiary possessed the required 12 months of experience.

On motion³ and on appeal, the petitioner, through counsel, maintains that the beneficiary has the necessary experience described in the labor certification.

¹There is no indication in this case that the petitioner is requesting a visa based on the beneficiary as an alien of exceptional ability. Further, the ETA Form 9089 replaced the Form ETA 750 after new DOL regulations went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004).

²The petitioner must demonstrate that the beneficiary possesses the qualifications as certified on the ETA Form 9089 by the DOL and submitted with the instant petition. The beneficiary must possess the qualifications beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). In this case, the priority date is August 17, 2011.

³ The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision. A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).⁴

Section 205 of the Act, states: "[t]he Attorney General [now Secretary, Department of Homeland Security] may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may constitute good cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988)

Section 203(b) of the Act states in pertinent part that:

(2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --

(A) In general. -- Visas shall be made available . . . to qualified immigrants who are 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.

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

[A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate 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 degree or a foreign equivalent degree.

The job qualifications are found on Part H of the ETA Form 9089. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered.

In this matter, Part H reflects the following minimum requirements:

H.4. Education: Minimum level required: Master's.

4-B. Major Field Study: Computer Science, Engineering, Math or equiv.

⁴The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary. We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.

7. Is there an alternate field of study that is acceptable?

The petitioner checked “no” to this question.

8. Is there an alternate combination of education and experience that is acceptable?

The petitioner checked “no” to this question.

9. Is a foreign educational equivalent acceptable?

The petitioner listed “yes” that a foreign educational equivalent would be accepted.

6. Experience: 12 months in the position offered,
10. or 12 months in the alternate occupation of Senior Network and Computer Systems Administrator, Senior Network Engir⁵

14. Specific skills or other requirements:

Experience in: Designing and implementing Layer 3 and Layer 3 networks using Cisco Routers, Cisco Catalyst switches, Firewalls (PIX and ASA) and SSL VPN. Designing Firewall security policies, designing and implementing information systems security and virtualization infrastructure using VMware 3.x products. Relocation and travel to unanticipated locations within USA Possible. Note: Employer will accept suitable combination of education, training or experience

Counsel asserts that the petitioner established that the beneficiary possessed the required 12 months of experience set forth in the labor certification as of the priority date of August 17, 2011.

It is noted that, although DOL certified the ETA Form 9089, its role is limited to determining whether there are sufficient workers who are able, willing qualified and available, and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).⁶

⁵ We take this word to be “Engineer.”

⁶ In *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United

As set forth on the ETA Form 9089, the beneficiary's qualifying experience is stated as: senior information system security engineer for [REDACTED] from April 21, 2010 to the present; senior network & computer systems administrator for [REDACTED] from August 10, 2005 to April 20, 2010; and senior network engineer for [REDACTED] from April 21, 2003 to August 5, 2005. No other experience is listed. The beneficiary signed the labor certification on August 17, 2011, declaring that the contents were true and correct under penalty of perjury.

On April 25, 2013, the director determined that two submitted employment verification letters from [REDACTED] respectively, failed to sufficiently verify that as of the priority date, the beneficiary had 12 months of experience including the specific skills set forth in H.14 of the ETA Form 9089. The director noted that the [REDACTED] letter was inconsistent with the employment claimed to be for [REDACTED] during the same period listed on the ETA Form 9089 and the [REDACTED] letter failed to demonstrate that the beneficiary acquired the specific skills described in H.14 of the ETA Form 9089.

On motion, the petitioner supplies a letter, dated May 9, 2013, from [REDACTED] stating that the beneficiary worked as a contractor for that firm under his employer, [REDACTED] of Iowa. Counsel also contends that the letters, when considered together, verify the specific skills required by H.14. As we consider the subsequent letter to be new evidence in support of a motion to reopen, we will remand this matter for the director to consider. On remand, the director may also wish to further examine the relationship and connections of the [REDACTED] companies to the petitioner and whether the claimed experience, based on the discrepancies contained in the record, can be reasonably considered.⁷

Further, the employer must offer full-time, permanent employment and not be seeking to subcontract. 20 C.F.R. § 656.3. We note that the record also raises the question whether the petitioner intends to be the direct employer of the beneficiary, which the director may consider on remand.

Additionally, although not a basis for the revocation of the employment-based petition, and despite the petitioner's assets reflected on its tax returns and salaries, it is not clear that the petitioner established its ability to pay the proffered wage for this beneficiary in that USCIS electronic records indicate that the petitioner has filed at least 160 employment-based petitions, including 118 non-immigrant petitions and 40 immigrant petitions. Where a petitioner files I-140 petitions for multiple beneficiaries, it is incumbent on the petitioner to establish its continuing financial ability to pay all proposed wage offers as of the respective priority date of each pending petition. Each petition must conform to the requirements of 8 C.F.R. § 204.5(g)(2) and be supported by pertinent financial

States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

⁷ Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

documentation.

The petitioner has also asserted that it is the successor-in-interest to [REDACTED] If the petitioner assumed the immigration related liabilities of [REDACTED] then it is not clear that all of those remaining sponsored workers transferred to the petitioner have been accounted for in the petitioner's chart submitted in response to the director's NOIR. Any sponsored workers and transferred workers from any intervening entity may also need to be accounted for in the petitioner's ability to pay the proffered wage if part of the full successorship chain.⁸ In the response to the director's NOIR, counsel also states that workers who obtained permanent residency were omitted in the chart, but does not identify the beneficiaries, the dates of permanent residency obtained, and whether any of those wages would be relevant in the year of the beneficiary's priority date (2011) or subsequent to the priority date. On remand, the petitioner should fully address all sponsored beneficiaries and provide all pertinent tax returns and financial information.

In addition, the director's NOIR requested certified tax returns. Counsel indicates that certified tax returns or transcripts cannot be obtained from the Internal Revenue Service. The director may wish to reiterate this request on remand or request that the petitioner provide a consent to release such information to USCIS.

In view of the foregoing, we remand the petition for further investigation and review.⁹ The director may request, and the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision.

⁸ USCIS has not issued regulations governing successors-in-interest. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) ("*Matter of Dial Auto*") a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the Commissioner in 1986.

⁹ Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).