

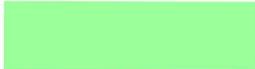


U.S. Citizenship
and Immigration
Services

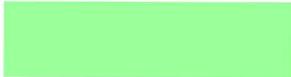
(b)(6)



DATE: **AUG 26 2014**

OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE:

Petitioner: 

Beneficiary:

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)

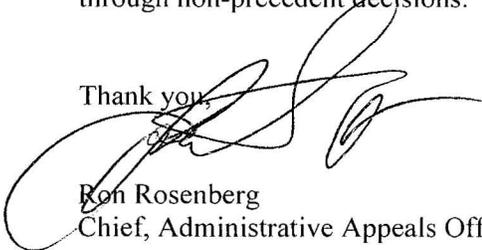
ON BEHALF OF PETITIONER:



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 denied by the Director, Nebraska Service Center. 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 The director's decision will be withdrawn and the matter remanded for further investigation and review.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 an information technology specialist 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.

The Form I-140, Immigrant Petition for Alien Worker was filed on January 10, 2012. The Form I-140 states that the petitioner, [REDACTED], is located at [REDACTED]. The petition is signed by [REDACTED] and dated January 3, 2012. Mr. [REDACTED] also signed the ETA Form 9089, identifying himself as the petitioner's president.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The priority date 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). A petitioner must establish that the beneficiary has the education, training, and experience required by the labor certification and that it has had the continuing ability to pay the proffered wage from the priority date forward. *See* 8 C.F.R. 204.5(g)(2); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). In this matter, the priority date is August 23, 2011 and the proffered wage is \$98,571 per year.

The director denied the decision on February 29, 2012, finding that the petitioner had failed to resolve questions related to its ownership, its number of employees, and the beneficiary's experience.

On appeal, the petitioner, through counsel, submits additional documentation and asserts that the petitioner complied with the requirements of 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).

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).²

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

The petitioner checked "no" to this question.

²The 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.

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 an alternate occupation of Systems Analyst or equiv.

14. Specific skills or other requirements:

Experience in: TIM, RBAC, LDAP, IIS, GSO, Disaster Recovery, SunOne directory server, TAI+++, Authorization Server, SSO infrastructure setup and integrating WEBSEAL and other Applicatiuonn/Webserver by implementing Web Trust Association in WAS using TAI. Installing, patching, configuring, unconfiguring and uninstalling TAM components including Policy Server. Relocation and travel to unanticipated locations within USA possible. Note: Employer will accept suitable combination of education, training or experience.

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).³

Schedule K of the 2011, 2012 and 2013 corporate tax returns reflect that [REDACTED] is the 95% shareholder of the petitioning business. The record, however, also contains documentation that a trust identified as the “SS Trust” holds 950 shares of the petitioner. The SS Trust consists of [REDACTED]

³ 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 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.*

█ and his spouse as settlors and co-trustees. No explanation has been offered why the petitioner's tax returns reflect █ as the principal shareholder rather than the SS Trust and calls into question the veracity of the evidence submitted. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

It is noted that Part K of the ETA Form 9089 lists the beneficiary's prior employment. The only job listed identifies █ Iowa as the beneficiary's employer from March 29, 2006 with no end date listed. The director rejected consideration of █/Iowa's employment verification letter, signed by █ based on that company's September 13, 2011, criminal conviction in the federal district court of the Southern District of Iowa on a charge of false statements to a government agency (18 U.S.C. § 1001(a)(3)). *See Matter of Ho*, 19 I&N Dec. at 591 (stating that doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition).

The petitioner subsequently submitted copies of various documents describing the beneficiary's work at various third-party client sites where █ had contracted the beneficiary to a firm, who in turn contracted the beneficiary out to one of its clients. However, the evidence is insufficient to determine whether the █ remained the actual entity in control of the beneficiary's employment based on the attenuated relationship and can validly attest to that employment experience, or whether another entity was the actual employer⁴ in these situations and should more properly have attested to the experience or be listed on the ETA Form 9089. *Id.*, at 591. As such, although we concur with counsel that experience in the special skills required may not be read as requiring twelve months in each skill, it must still be determined whether the █ can validly attest to the beneficiary skills during the period claimed based on the attenuated contracting out of the beneficiary. The director should also address on remand whether the petitioner has established that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).⁵

⁴ In determining whether there is an "employee-employer relationship," the Supreme Court of the United States has determined that where a federal statute fails to clearly define the term "employee," courts should conclude "that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)).

⁵ The regulation at 8 C.F.R. § 204.5(g)(1) provides that evidence relating to qualifying experience or training shall consist of letters from the employer or trainer and should include the name, address, title of the writer as well as a specific description of the duties performed by the alien or the training received.

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

Additionally, although the petitioner has supplied additional financial information and a chart listing its workers, 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 documentation. The director may wish to review this information on remand and determine whether the petitioner has established its continuing ability to pay the proffered wage. Additionally, 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 documentation. Any sponsored workers and transferred workers from any intervening entity would also need to be accounted for in the petitioner's ability to pay the proffered wage if part of the full successorship chain. On remand, the petitioner should fully address all sponsored beneficiaries and provide all pertinent tax returns and financial information.

In view of the foregoing, we remand the petition for further investigation and review. 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, which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.