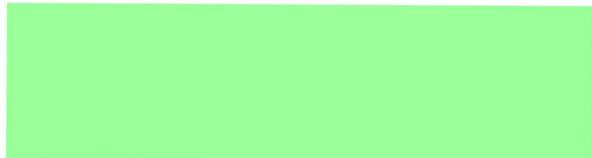




U.S. Citizenship
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Services

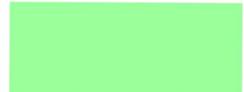
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DATE: DEC 30 2014

OFFICE: TEXAS SERVICE CENTER

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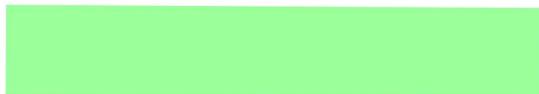


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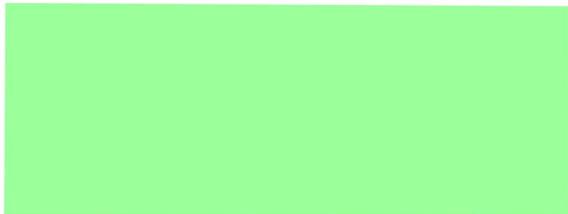
Petitioner:

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 (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, 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 The Director's decision will be withdrawn and the case remanded for further consideration and a new decision by the Director.

The petitioner describes itself as a research and development engineering company. It seeks to employ the beneficiary permanently in the United States as a research 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). This statutory provision provides for the granting of immigrant classification to aliens of exceptional ability¹ and members of the professions holding advanced degrees² or their equivalent whose services are sought by an employer in the United States.

The Form I-140, Immigrant Petition for Alien Worker, was filed on September 27, 2010. As required by statute, the petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which was filed at the U.S. Department of Labor (DOL) on June 3, 2009, and certified by the DOL (labor certification) on March 30, 2010. The petitioner also submitted copies of the beneficiary's educational credentials, showing that he earned a Master of Science degree from the [REDACTED] in 2007, and the three latest pay statements issued by the petitioner to the beneficiary from the summer of 2010.

On February 23, 2011, the Director issued a Request for Evidence (RFE) in which the petitioner was requested to submit additional evidence of its ability to pay the proffered wage of the job offered from the priority date, June 3, 2009,³ up to the present. The petitioner responded to the RFE with additional documentation, including copies of its federal income tax returns (IRS Forms 1065) for the years 2009 and 2010.

¹ In this case the petitioner is requesting a visa for the beneficiary as an advanced degree professional, not as an alien of exceptional ability.

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.

³ The priority date of a petition is the date the underlying labor certification application was received for processing by the DOL.

On April 12, 2011, the Director issued a Notice of Intent to Deny (NOID) the petition on the ground that the petitioner failed to acknowledge an existing business relationship with the beneficiary on the ETA Form 9089. In the Director's view, this omission undermined the credibility of the labor certification process before the DOL and raised questions about whether a *bona fide* job opportunity existed that was available to U.S. workers.

The petitioner responded to the NOID with a letter from counsel, dated May 10, 2011, which contended that: (1) the beneficiary is a "profit sharing" member of the LLC with no capital ownership or voting rights; (2) the beneficiary has a *bona fide* employer-employee relationship with the petitioner under common law because his membership in the LLC is only on a profit-sharing basis and involves no ownership interest or voting rights; (3) the beneficiary has no ownership in the petitioner, as evidenced in (a) Schedule K-1 of the petitioner's federal income tax returns (IRS Forms 1065) for 2009 and 2010, which lists the beneficiary's capital share of the LLC as zero, and (b) the "Agreement between [the beneficiary] and [redacted]" which describes the limitations of the beneficiary's profit-sharing membership in the LLC; and (4) the beneficiary was mistakenly categorized as an "LLC Member-Manager" on the petitioner's federal income tax returns, which were being amended to re-categorize him as an "Other LLC Member."

On May 24, 2011, the Director denied the petition. In the decision the Director noted that the petitioner answered "No" to the question at Part C.9. of the ETA Form 9089, which asks: "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators and the alien?" The Director found that the petitioner's answer to this question conflicted with information in its federal income tax returns (IRS Forms 1065) for the years 2009 and 2010, which identified the beneficiary as a "general partner or LLC member-manager" on Schedule K-1. Not disclosing this relationship to the DOL during the labor certification process, the Director determined, indicated that the proffered position was not truly available to all qualified applicants and led the DOL to certify an ETA Form 9089 it would otherwise have denied. With regard to the letter from counsel and its four-part response to the NOID, the Director stated that no documentary evidence was submitted to support any of the claims, despite references to pertinent documentation in the letter.⁴ The Director pointed out that annual reports filed by the petitioner with the State of Florida identified the beneficiary as a "Managing Member" of the LLC at least since 2008 (in accord with the tax returns in the record), contradicting the petitioner's claim that the beneficiary only had profit-sharing rights. Based on the factors discussed above, the Director concluded that the petitioner submitted falsified evidence in support of a material fact, making the beneficiary ineligible for classification as an advanced degree professional. The petition was denied with a finding of fraud. The Director also found that the beneficiary misrepresented a material fact on the ETA Form 9089 by indicating he had no ownership interest in the petitioner, a factor to be considered in any future proceeding involving the issue of the beneficiary's admissibility.

⁴ Actually, the IRS Forms 1065 for 2009 and 2010 did offer evidence that the beneficiary had no capital ownership interest in the LLC, though the information provided in Schedule K-1 is conflicting.

The petitioner filed a timely appeal, supplemented by a brief from counsel and supporting documentation. We conduct appellate review on a *de novo* basis. *See Soltane v. Department of Justice*, 381 F.3d 143, 145 (3d Cir. 2004).

In the appeal brief counsel restates the salient points of its prior letter in response to the NOID. Specifically, counsel contends that:

1. the beneficiary was made a member of the company with the sole purpose of reporting his profit-sharing earnings to the IRS [Internal Revenue Service] without the need to set up a federally-approved profit-sharing plan;
2. the beneficiary does not have any capital ownership or voting rights in, or exercise any control over, the company;
3. the beneficiary's membership in the company is forfeitable immediately upon termination of employment and/or if his performance as an employee is deemed unsatisfactory; and
4. the categorization of the beneficiary in recent tax returns as an "LLC Member-Manager" was an error, and he should have been categorized as "Other LLC Member."

The petitioner submitted copies of its Operating Agreement, dated October 17, 2007, which distinguishes its two types of members, standard and profit-sharing, and identifies the beneficiary as a profit-sharing member, along with a company resolution, dated December 6, 2008, establishing the terms and conditions of the profit-sharing agreement with the beneficiary. The petitioner also submitted a copy of letter to the beneficiary, dated June 15, 2010, offering him employment as Vice President for Research & Development, accompanied by a description of the job duties. The petitioner submitted a copy of a letter from its certified public accountant (CPA), dated August 15, 2011, indicating that the IRS defines a limited partner as one who does not participate in management decisions. The CPA stated that he had prepared amended tax returns for the petitioner for the years 2007-2010 to reflect that the beneficiary was (and is) a limited partner with no management authority and confirming that the beneficiary has no capital ownership interest in the petitioner. Copies of two new IRS Forms 1065 were submitted, signed by the petitioner's president on August 11, 2011, and by the CPA on August 15, 2011, which categorized the beneficiary as a "Limited partner or other LLC member" rather than a "General partner or LLC member-manager."

On December 20, 2012 we issued a notice to the petitioner advising that the proceedings would be held in abeyance while the case was referred to the DOL for its advice as to the validity of the labor certification and whether the DOL intended to take any action based on the information to be provided by our office about the relationship between the petitioner and the beneficiary.

On April 30, 2014, the DOL issued a Notice of Final Decision. The decision indicated that the DOL had issued a Notice of Intent to Revoke its certification of the petitioner's ETA Form 9089, to which the petitioner responded with additional documentation that the DOL determined "adequately demonstrates that the foreign worker does not have an ownership interest in the employer." Based on this finding the DOL "determined that the certification for this case remains valid, and no further action will be taken."

In view of this action by the DOL, we will remand this case to the Director for further consideration. The Director shall revisit the issue of whether the petition merits denial for the reasons discussed in the decision of May 24, 2011, and make determinations on all other outstanding issues to fully adjudicate the petition. The Director shall determine whether the petitioner has established its continuing ability to pay the proffered wage from the priority date (June 3, 2009) up to the present, and whether the proffered position as described in the labor certification and the petition accords with the job offered to the beneficiary in the petitioner's letter of June 15, 2010.⁵ The Director may request additional evidence from the petitioner on the above issues, and any other issue(s) as necessary, and allow the petitioner a reasonable period to respond. The Director shall then issue a new decision.

As always in visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966).

ORDER: The petition is remanded to the Director for further consideration, in accordance with the foregoing discussion, and the entry of a new decision that adjudicates all outstanding issues.

⁵ The offer letter of June 15, 2010, and the accompanying job description refer to the proffered position as "Vice President for Research & Development." We note that the job title and duties set forth in these documents from 2010 differ from the job title and duties set forth in the ETA Form 9089 that was filed with the DOL in 2009 and the petition filed with U.S. Citizenship and Immigration Services (USCIS) in 2010.