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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

DATE: **FEB 28 2014** OFFICE: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink that reads "Elizabeth McCormack".

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a developer and manufacturer of medical software and technology. It seeks to permanently employ the beneficiary in the United States as a sales and service manager. The petitioner requests classification of the beneficiary 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).

At issue in this case is whether the beneficiary possesses a master's degree or in the alternative a bachelor's degree plus five years of progressive work experience equivalent to a U.S. advanced degree or a foreign degree equivalent; and therefore, meets the requirements of the labor certification.

### I. PROCEDURAL HISTORY

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).<sup>1</sup> The priority date of the petition is June 29, 2012.<sup>2</sup>

Part H of the labor certification states that the offered position has the following minimum requirements:

- H.4. Education: Bachelor's Degree in Business.
- H.5. Training: None required.
- H.6. Experience in the job offered: 60 months required.
- H.7. Alternate field of study: None required.
- H.8. Alternate combination of education and experience: None required.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: None accepted.
- H.14. Specific skills or other requirements: 5 years Latin America/Caribbean medical equipment sales experience. Experience must include sale of Radiotherapy & Radiosurgery devises, WebEx, Sales Force and QuoteBase.

Part J of the labor certification states that the beneficiary possesses a Bachelor's degree in Business from [REDACTED] Brazil, completed in 2007. The record contains a copy of the beneficiary's Bachelor of Administration degree issued by [REDACTED] Brazil, for his completion of the course in Administration on February 13, 2008, and the award of the degree on April 30, 2008. The petitioner

<sup>1</sup> See section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); see also 8 C.F.R. § 204.5(a)(2).

<sup>2</sup> The priority date is the date the DOL accepted the labor certification for processing. See 8 C.F.R. § 204.5(d).

also submitted a copy of the beneficiary's academic transcripts from [REDACTED] Brazil.

The record also contains an evaluation prepared by [REDACTED] and dated June 19, 2013 in which the evaluator concluded that the nature of the courses and the credit hours involved indicate that the beneficiary attained the foreign equivalent of a Bachelor of Business Administration Degree from an accredited U.S. college or university.

On appeal, the petitioner submitted a copy of the beneficiary's academic transcripts from [REDACTED] showing that the beneficiary completed courses in business administration, with a graduation date of February 13, 2008, and April 30, 2008 as the date the diploma was issued to the beneficiary.

The petitioner submitted a sworn Certificate of Completion dated September 10, 2013 in which the representative from [REDACTED] stated that the beneficiary completed the administration program with a concentration in business management, and that he graduated on February 13, 2008, having fulfilled all of the required credits.

The petitioner submitted an affidavit from the beneficiary who stated that he completed his classes at [REDACTED] on December 7, 2007 and that the university held the graduation ceremony on February 13, 2008. The beneficiary further stated that he was informed by university officials in a letter from [REDACTED] that he had accomplished all requirements to become a Bachelor in Business Administration and that his diploma would be produced and delivered in April 2008. The beneficiary stated that the diploma was finalized on April 30, 2008.

The beneficiary set forth his credentials on the labor certification at Part K.9 and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's 60 months (five years) of work experience in the job offered (K.9), he represented the following:

- That he was employed by [REDACTED] as a regional manager from January 10, 2011 to December 28, 2011. The beneficiary described his job duties as a regional manager.
- That he was employed by [REDACTED] as a sales manager from December 1, 2003 to December 31, 2010. The beneficiary described his job duties as a sales manager.

The beneficiary also indicated at K.9 Job1 of the labor certification that he was employed by the petitioner as a sales and service manager: Central America from January 2, 2012 to the present. However, 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 indicates in response to question H.8-C that five years of progressive work experience in the job offered or in a related field is required. 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<sup>3</sup> and the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation.

The beneficiary indicated on the labor certification that his position with the petitioner was that of sales and service manager: Central America..., and described his job duties as being the same duties as described for the position offered. The petitioner submitted a letter dated June 17, 2013, in which the human resource manager stated that the company has employed the beneficiary as a sales and service manager: Central America and Caribbean since January 2012, and that his duties mirror those described in the letter.<sup>4</sup> Therefore, the experience gained with the petitioner was in the position offered and is substantially comparable as he was performing the same job duties more than 50 percent of the time. According to DOL regulations, therefore, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position. Additionally, as the terms of the labor certification supporting the instant I-140 petition do not permit consideration of experience in an alternate occupation, and the beneficiary’s experience with the petitioner was in the position offered, the experience may not be used to qualify the beneficiary for the proffered position.

The record of proceeding contains the following experience letters:

- A letter dated June 14, 2013 from the finance manager of [REDACTED] in Brazil who stated that the company employed the beneficiary on a full-time basis from January 10, 2011 to December 28, 2011. Although the declarant describes the beneficiary’s job duties, she does not specify the beneficiary’s job title. In addition, the letter appears to have been written on the petitioner’s stationery.
- A letter dated June 14, 2013 from the accounting supervisor of [REDACTED] who stated that the company employed the beneficiary full-time from [REDACTED]

<sup>3</sup> A definition of “substantially comparable” is found at 20 C.F.R. § 656.17:

5) For purposes of this paragraph (i):

...  
(ii) A “substantially comparable” job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

<sup>4</sup> The beneficiary’s duties mirror those described by the petitioner in the labor certification.

December 1, 2003 to December 31, 2010. Although the declarant described the beneficiary's job duties, he failed to specify the beneficiary's job title.

Upon reviewing the petition, the director determined that the beneficiary did not meet the job qualifications stated on the labor certification. Specifically, the director determined that the labor certification required at a minimum a bachelor's degree and five years of progressive post-baccalaureate experience. The director further determined that the petitioner submitted evidence to establish that the beneficiary had been awarded a bachelor's degree equivalent, but that the evidence failed to show that the beneficiary has the five years of progressive qualifying experience to show equivalence to an advanced degree.

On appeal, counsel asserts that the beneficiary meets the requirements for the position of sales and service manager: Central America and Caribbean, in that the length of employment experience as expressed in the experience letters provided by [REDACTED] together constitute eight years of experience in the position. Counsel further asserts that the petitioner has demonstrated that the beneficiary meets the definition for classification as a member of the professions holding an advanced degree as it is defined by the regulations at 8 C.F.R. § 204.5(k) in that the petitioner has presented the beneficiary's baccalaureate degree as well as evidence that he has attained five years of progressive experience in the specialty after the completion of his degree. Counsel asserts that the employment experience evidence consists of the two employment verification letters and the employment letter from the petitioner as noted above; demonstrating that the beneficiary has worked in the field from February 2008, after the completion of his degree, until June 25, 2013, the filing date of the Form I-140 petition. Counsel cites to *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

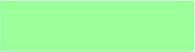
The petitioner's appeal is properly filed and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis.<sup>5</sup> The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>6</sup> A petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision.<sup>7</sup>

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<sup>5</sup> See 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. See, e.g., *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

<sup>6</sup> The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 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 newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>7</sup> See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003).



## II. LAW AND ANALYSIS

### **The Roles of the DOL and USCIS in the Immigrant Visa Process**

At the outset, it is important to discuss the respective roles of the DOL and U.S. Citizenship and Immigration Services (USCIS) in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).<sup>8</sup> *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for

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<sup>8</sup> Based on revisions to the Act, the current citation is section 212(a)(5)(A).

the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

*Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

*K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

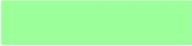
The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms 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.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). See generally *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

*Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984).



Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and the beneficiary are eligible for the requested employment-based immigrant visa classification.

### **Eligibility for the Classification Sought**

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

[A]ny 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

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

- (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
- (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, the job offer portion of the labor certification must require a professional holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(i).

Therefore, an advanced degree professional petition must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a

professional holding an advanced degree. Further, an "advanced degree" is a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, or a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty.

In the instant case, the petitioner claims that the beneficiary may be classified as an advanced degree professional based on a foreign equivalent degree to a U.S. bachelor's followed by at least five years of progressive experience in the specialty.

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. 8 C.F.R. § 204.5(g)(1). If such evidence is unavailable, USCIS may consider other documentation relating to the beneficiary's experience. *Id.*

As noted above, the petitioner must demonstrate that the beneficiary qualified with a master's degree in business or a bachelor's degree plus five years of progressive work experience as of the priority date, June 29, 2012, not as of the filing date of the I-140 petition.

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 labor certification indicates that the beneficiary's experience gained with the petitioner since January 2012 was in the position offered and is substantially comparable as he was performing the same job duties more than 50 percent of the time; therefore, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position.

The calculated time period during which the beneficiary was employed by [REDACTED] (April 30, 2008 to December 31, 2010)<sup>9</sup> is 975 days or 2 years, 8 months, 1 day.

Counsel asserts that the five years of progressive work experience is from February 13, 2008, the date of the beneficiary's graduation from [REDACTED] in Brazil. The petitioner submits as evidence on appeal a certificate dated September 10, 2013, and signed by the Costumer Service Supervisor, Secretariat of Academic Administration at [REDACTED]

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<sup>9</sup> As noted above, the requisite five years of progressive post-baccalaureate experience in the job offered in this matter must be demonstrated from April 30, 2008, the date the beneficiary received his Bachelor's Degree of Administration from [REDACTED]. It is noted that April 30, 2008 is written on the bachelor's degree as the award date. Although the petitioner claims that the beneficiary received his degree for completing all required courses on February 30, 2008, it differs from the date that the beneficiary actually received his degree. 8 C.F.R. § 204.5(g)(1). The bachelor's degree reads in part: "The Dean of [REDACTED] in the exercise of her attributes, observing the completion of the course in Administration on February 13, 2008, confers the title of Bachelor of Administration to [REDACTED] ...and awards him the present Diploma, with all rights and privileges thereunto appertaining. [REDACTED] April 30, 2008."

[REDACTED] who stated that the beneficiary completed his bachelor's degree in business management and graduated on February 13, 2008, having fulfilled all of the required credits. The petitioner also submitted a copy of the beneficiary's academic transcripts which indicate that the beneficiary completed his studies at [REDACTED] in Brazil in February 2007, graduated February 13, 2008, and his diploma was issued on April 30, 2008. Even if, as counsel asserts, the AAO were to calculate the beneficiary's employment commencing February 13, 2008 to December 31, 2010, it would demonstrate that the beneficiary was employed by [REDACTED] for 1052 days or 2 years, 10 months, 18 days. This time period would also be insufficient to establish that the beneficiary had the requisite five years of progressive post-baccalaureate experience as required by the labor certification.

The calculated time period during which the beneficiary was employed by [REDACTED] in Brazil (January 10, 2011 to December 28, 2011) is 352 days or 11 months, 18 days. The number of days combined is insufficient to demonstrate that the beneficiary had the requisite five years of progressive post-baccalaureate experience as required by the labor certification, as of the priority date, June 29, 2012.

Accordingly, the petitioner established that the beneficiary has 3 years, 7 months, 19 days (3 years, 9 months, 36 days from February 13, 2008) of qualifying post-baccalaureate experience. However, the petitioner has failed to establish that the beneficiary has the requisite 60 months (five years) of progressive post-baccalaureate experience or that he is qualified to perform the duties of the proffered position as of the priority date. 8 C.F.R § 204.5(g)(1).

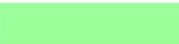
Therefore, it has not been established that the beneficiary has five years of progressive, post-baccalaureate experience, and thus, he does not qualify for preference visa classification under section 203(b)(2) of the Act.

After reviewing all of the evidence in the record, it is concluded that the petitioner has failed to establish that the beneficiary possessed at least a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, or a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty. Therefore, the beneficiary does not qualify for classification as an advanced degree professional under section 203(b)(2) of the Act.

### **The Minimum Requirements of the Offered Position**

The petitioner must also establish that the beneficiary satisfied all of the educational, training, experience and any other requirements of the offered position by the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the job offer portion of the labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional



requirements. See *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). Even though the labor certification may be prepared with the beneficiary in mind, USCIS has an independent role in determining whether the beneficiary meets the labor certification requirements. See *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 7 (D. Or. Nov. 30, 2006).

In the instant case, the labor certification states that the offered position requires a master's degree in business or a bachelor's degree plus five years of progressive post-baccalaureate experience in the specialty.

For the reasons explained above, the petitioner has failed to establish that the beneficiary possesses the required experience for the offered position.

The petitioner failed to establish that the beneficiary possessed the minimum requirements of the offered position set forth on the labor certification by the priority date. Accordingly, the petition must also be denied for this reason.

### III. CONCLUSION

In summary, the petitioner failed to establish that the beneficiary possessed an advanced degree as required by the terms of the labor certification and the requested preference classification. Therefore, the beneficiary does not qualify for classification as a member of the professions holding an advanced degree under section 203(b)(2) of the Act. The director's decision denying the petition is affirmed.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.