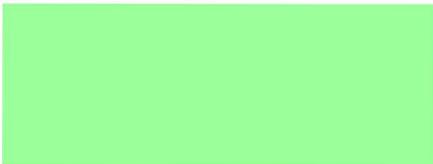




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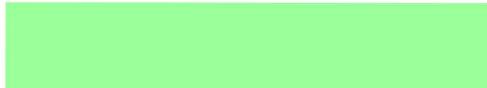


DATE: OFFICE: TEXAS SERVICE CENTER

JUL 25 2014

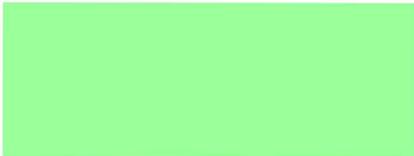
FILE: 

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 (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,

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner describes itself as a full-service digital printing company. It seeks to permanently employ the beneficiary in the United States as a business development 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 an advanced degree as required by the terms of the labor certification and the requested preference classification.

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).¹ The priority date of the petition is January 8, 2013.²

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

- H.4. Education: Bachelor's in Business Administration.
- H.5. Training: None required.
- H.6. Experience in the job offered: 60 months in the job offered.
- H.7. Alternate field of study: None accepted.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Not Accepted.
- H.10. Experience in an alternate occupation: 60 months in a related occupation.
- H.14. Specific skills or other requirements: Strong knowledge of marketing principles and research techniques and methodologies; Experienced in applying standard concepts, practices, and procedures within marketing and market research; Must be self-directed but able to work effectively in a team environment; strong analytical and communication skills required. Employer will accept any suitable combination of education, training and/or experience.

Part J of the labor certification states that the beneficiary possesses a Bachelor's in Business Administration from [REDACTED] in Venezuela, completed in 2003. The record contains a copy of the beneficiary's diploma and transcripts from [REDACTED] in Venezuela, issued on October 7, 2003.

¹ 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).

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

The record also contains an evaluation of the beneficiary's educational credentials prepared by [REDACTED] for [REDACTED] on March 20, 2009. The evaluation states that the beneficiary's degree is the foreign equivalent to a U.S. Bachelor's degree in Business Administration from an accredited university or college.

Part K of the labor certification states that the beneficiary possesses the following employment experience:

- Marketing Manager with [REDACTED] in Venezuela from November 1, 2007 until July 1, 2009.
- VP Business Development, Quality of Service Manager, and Advertising and Promotion Supervisor with [REDACTED] in Venezuela from November 1, 1995 until October 1, 2007.

The petitioner submitted the following evidence of the beneficiary's experience prior to the director's denial:

- A translated experience letter from [REDACTED] Human Resources Manager, [REDACTED] [REDACTED] stating that the beneficiary worked at this financial institution: as VP of Business Development; Customer Service Quality Manager; and Advertising and Promotional Dept. Head during the years from November 1, 1995 to October 1, 2007.
- A translated experience letter from [REDACTED] Manager – Human Resources on [REDACTED] letterhead, dated August 2013, stating that the company employed the beneficiary as a Marketing Manager from November 15, 2007 until July 30, 2009.

The director denied the petition because the petitioner had not established that the beneficiary possessed an advanced degree as required in the approved labor certification and by the immigrant visa category.

On appeal, the petitioner submits additional employment verification letters; a job description; and commercial registry documentation to establish the merger between [REDACTED] [REDACTED]. The petitioner resubmits the beneficiary's education credentials and evaluation dated March 20, 2009 from [REDACTED]. The petitioner states through counsel that the updated experience letters establish that the beneficiary qualifies and is eligible for a visa in the advanced degree professional category.

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.³ We consider all pertinent evidence in the

³ 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.*

record, including new evidence properly submitted upon appeal.⁴ 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.⁵

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 left to USCIS to determine whether the offered position and the beneficiary qualify for the requested preference classification, and whether the beneficiary satisfies the minimum requirements of the offered position as set forth on the labor certification.

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).⁶ *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14)

DOJ, 381 F.3d 143, 145 (3d Cir. 2004).

⁴ 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).

⁵ *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

⁶ Based on revisions to the Act, the current citation is section 212(a)(5)(A).

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 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 duties of 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 degree equivalent to a U.S. bachelor's degree, followed by at least five years of progressive experience in the specialty.

The evidence establishes that the beneficiary's bachelor's degree is equivalent to a bachelor's degree in business administration from an accredited university in the United States.

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.*

On appeal, the petitioner submits the following translated experience letters in support of the beneficiary's work experience:

- A letter from [REDACTED] Talent Management VP on [REDACTED] letterhead dated January 2014, stating that this financial institution employed the beneficiary as a Business VP from October 16, 2006 until October 15, 2007; Manager of Personal Banking from September 15, 2005 until October 15, 2006; Quality and Service Manager January 1, 2003 until September 14, 2005; and Advertising and Promotion Supervisor from November 16, 1995 until December 31, 2002.
- A letter from [REDACTED] Classification and Remuneration Manager on [REDACTED] letterhead dated February 24, 2014, stating "this bank" employed the beneficiary as a Marketing Manager from November 1, 2007 until June 22, 2009.

We accept the proof of the beneficiary's experience at [REDACTED]. However, the length of employment at this bank does not constitute at least five years of post-baccalaureate experience as required in 8 C.F.R. § 204.5(k)(2). The evidence in the record establishes that the beneficiary earned her degree on July 29, 2003. Therefore, we will consider the experience gained

from July 29, 2003 onwards. The experience letter from [REDACTED] establishes the beneficiary's progressive post baccalaureate work experience from July 30, 2003 until October 15, 2007, which is approximately 4 years, 2 months, and 16 days.

The letter from [REDACTED] on [REDACTED] letterhead is inconsistent with the letter from [REDACTED] on [REDACTED] letterhead in that both letters indicate that the beneficiary was employed at the same time by the two different banks. On appeal, the petitioner suggests that the beneficiary's employment letters from [REDACTED] and from [REDACTED] are valid for the beneficiary's claimed employment as Marketing Manager at [REDACTED] from November 1, 2007 – June 22, 2009. The petitioner submits a partially translated certificate from the Superintendent Office of Banking Institutions. The translated certificate does not provide a date when any merger transaction occurred or a complete translation of the document.

The translation of the stock augmentation document as proof of a merger between [REDACTED] and [REDACTED] does not comply with the terms of 8 C.F.R. § 103.2(b)(3), which provides that:

Translations. Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

Because the petitioner failed to submit a certified translation of the complete documentation submitted, we cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence will not be accepted.

We have searched in publicly available records for the date of any the merger between [REDACTED] [REDACTED]. As noted above, the record contains an experience letter from [REDACTED], Manager – Human Resources on [REDACTED] letterhead, dated August 2013, stating that the company employed the beneficiary as a Marketing Manager from November 15, 2007 until July 30, 2009. The date of the letter from [REDACTED] of [REDACTED] on August 2013 is inconsistent with the noted merger in which [REDACTED] [REDACTED] is the surviving company effective January 11, 2012.

Further, the experience letter written by Ms. [REDACTED] does not include the specific description of the duties performed by the beneficiary with [REDACTED] nor has Ms. [REDACTED] established that she was a current or former employee who was a trainer or employer with [REDACTED]. While the record

⁷ A press release on the [REDACTED] website, indicates that a merger occurred on January 11, 2012 between [REDACTED] and that [REDACTED] is the surviving company.

does contain a description of job duties for a Marketing Manager with [REDACTED] [REDACTED] we cannot accept it as a specific job description of the beneficiary's duties while employed with [REDACTED]. Thus the experience letter from Ms. [REDACTED] does not establish the progressive post-baccalaureate work experience of the beneficiary.

Therefore, we find it more likely than not that the beneficiary did not have five years of post-baccalaureate experience in the specialty as of the priority date.

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 60 months of experience in the job offered or an alternate occupation. As noted above, the petitioner has not established the beneficiary's required 60 months of progressive post-bachelorette experience in the job offered or in an alternate occupation to qualify as an advanced degree professional. Thus, the petitioner has not established the beneficiary's minimum requirements for the position as required in the approved labor certification.

III. CONCLUSION

In summary, the petitioner failed to establish that the beneficiary possesses an advanced degree as required by the terms of the labor certification and the requested preference classification and that the beneficiary meets the minimum requirements of the position. 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.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.