



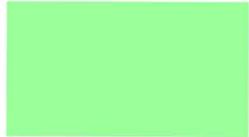
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **MAY 27 2014**

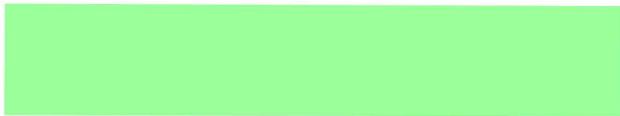
OFFICE: TEXAS SERVICE CENTER

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 employment-based visa petition was denied by the Director, Texas Service Center, (director) and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The case is now before the AAO on motion to reconsider. The motion will be granted, the appeal will be dismissed, and the petition will remain denied.

The petitioner describes itself as a software consulting firm. It seeks to employ the beneficiary permanently in the United States as a software engineer. 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). The director determined that the petitioner failed to establish the ability to pay the proffered wage as of the July 22, 2007, priority date and denied the petition on July 14, 2009. The AAO affirmed the director's denial on March 18, 2013. The AAO accepts the motion to reconsider under 8 C.F.R. § 103.5(a)(3).

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."

Ability to pay the proffered wage

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on July 22, 2007. The proffered wage as stated on the ETA Form 9089 is \$70,000 per year.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The March 18, 2013, decision of the AAO concluded that the petitioner had established the ability to pay the proffered wage from 2008 through 2011. The AAO also found that while the petitioner's 2007 net income and net current assets each exceeded the beneficiary's proffered wage, the petitioner had filed dozens of simultaneously pending Forms I-140 during the year of the priority date and in prior years. In response to the AAO's Request For Evidence, the petitioner submitted a list of 45 Forms I-140 which it had filed since 2005. This list also includes the proffered wages, actual wages paid, and priority dates. As 2007 was the only year that the petitioner did not pay the full proffered wage to the current beneficiary, the AAO reviewed only those petitions having priority dates of 2007 or earlier. There are 22 such petitions, excluding the instant petition and a subsequent petition filed on the beneficiary's behalf. Of the subjects of those 22 petitions pending simultaneously with the instant petition, nine were paid less than the proffered wage in 2007.

The shortfall in salaries for these nine beneficiaries was approximately \$188,094, which is an amount that exceeds both the petitioner's 2007 net income and 2007 net current assets. Accordingly, the AAO concluded that the petitioner had failed to establish the ability to pay the proffered wage in 2007 and dismissed the appeal.

On Motion to Reconsider, the petitioner again provided a listing of beneficiaries for whom it had petitioned, including the wages paid to those workers, the wages offered to them on their labor certifications, and the status of their petitions. The list identified several beneficiaries as having had their applications withdrawn. United States Citizenship and Immigration Services (USCIS) records confirm the denial or withdrawal of three of the petitions as identified on the list;² however, the

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 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, 766 (BIA 1988).

² USCIS records reflect the following: [redacted] with a priority date of September 18, 2003, was revoked on November 20, 2008; [redacted] with a priority date of September 17, 2007, was withdrawn on March 20, 2009; and, [redacted] with a priority date of August 31,

withdrawal of the petition for a fourth beneficiary [REDACTED] is not reflected in USCIS computer records. Therefore, in a February 28, 2014, Notice of Intent to Dismiss (NOID) the petitioner was requested to submit evidence that this petition had been withdrawn. The petitioner was also requested to submit Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement, for each of the beneficiaries named on the provided list, confirming the wages paid in 2007, as well as documentation of the petitioner's continued ability to pay the proffered wage in 2013, and copies of any Form W-2 or 1099 issued to the beneficiary in 2013. In response, the petitioner submitted copies of Forms IRS W-2 for 2007 for 22 workers and a copy of the beneficiary's 2013 Form W-2.³

In response to the NOID, the petitioner again stated that the petition filed under receipt number [REDACTED] had been withdrawn. The record reflects that this beneficiary was paid in excess of the proffered wage in 2007, so that the petitioner did not have any additional responsibility toward the beneficiary in 2007. Thus, the withdrawal of this petition does not affect the outcome of the current case.

The petitioner's net income in 2007 was \$116,299. This amount is insufficient to cover the deficiency of \$188,094 between the proffered wages of each beneficiary and the amounts paid to each beneficiary in 2007. The petitioner's net current assets in 2007 were \$102,112. This amount is also insufficient to cover the difference between the proffered wages of each beneficiary and the amounts paid to each beneficiary in 2007.

On motion, the petitioner indicates that it can pay the deficiencies in the proffered wages to the beneficiaries from both net income and net current assets. This approach is unacceptable because net income and net current assets are not, in the view of the AAO, cumulative. The AAO views net income and net current assets as two different methods of demonstrating the petitioner's ability to pay the wage--one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with counsel that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable.

2004, was denied on March 16, 2009. The petitioner is required to demonstrate the ability to pay the proffered wage to all beneficiaries of all petitions from the priority date until the petition is denied, withdrawn, or until the beneficiary attains permanent residence. As shown above, the petitioner must demonstrate the continued ability to pay the proffered wage for the three petitions above in 2007, as the petitions were denied, withdrawn, or revoked in 2008 or 2009.

³ The Form W-2 issued by the petitioner to the beneficiary in 2013 shows he was paid in excess of the proffered wage in that year.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). In this case, the petitioner has not established the historical growth of its business or its reputation within its industry, nor has it claimed the occurrence of any uncharacteristic business expenditures or losses during the years in question. The petitioner's revenues, payroll, officer compensation and other financial information contained on its tax returns are not sufficient to establish its ability to pay the proffered wage despite its shortfall in net income and net current assets. The petitioner did not demonstrate its ability to pay the proffered wages to the beneficiary by means of its net income or net current assets from the priority date or subsequently. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not submitted sufficient evidence to establish that it had the continuing ability to pay the proffered wage from the priority date onwards.

Beneficiary's qualifications

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 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).

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.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). The priority date of the petition is July 22, 2007, which is the date the

labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d). The Immigrant Petition for Alien Worker (Form I-140) was filed on August 17, 2007.

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).⁴ The priority date of the petition is July 22, 2007.⁵ The AAO noted in its February 28, 2014, NOID that the job title on the petition (software engineer) did not match the job title listed on the labor certification (business systems consultant). In response, the petitioner explained that the entry on the petition was in error and noted that the job duties described on the petition were identical to the job duties listed on the labor certification.

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

- H.4. Education: Master's Degree in business administration.
- H.5. Training: None required.
- H.6. Experience in the job offered: 24 months.
- H.7. Alternate field of study: MIS, computer applications, computer science or any engineering field.
- H.8. Alternate combination of education and experience: Bachelor's degree plus five years of experience.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: None accepted.
- H.14. Specific skills or other requirements: 24 months of experience in systems analysis and sales/marketing processes of applications in Siebel CRM and Selectica platforms. Employer accepts any suitable combination of education, training, or experience as alternative requirements. Eligible for employment at various client sites in the US.

Part J of the labor certification states that the beneficiary possesses a bachelor's degree in electronics and communications engineering from [REDACTED], in Chennai, Tamilnadu, India, completed in 1999. The record contains a copy of the beneficiary's diploma and transcripts from [REDACTED] issued in 1999.

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

- The beneficiary claimed to have worked for the petitioner in Irving, Texas, as a Business Systems Consultant from January 10, 2007, through the filing of the labor certification on July 22, 2007.
- The beneficiary claimed to have worked for the petitioner in Irving, Texas, from July 1, 2003, through December 31, 2006, as a software engineer.

⁴ *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).

⁵ The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

- The beneficiary claimed to have worked for [REDACTED] in San Jose, California, from November 1, 2002, through July 30, 2002, as a Java developer/Oracle developer.
- The beneficiary claimed to have worked for [REDACTED] Ltd. in Hyderabad, India, from September 1, 1999, through August 30, 2002, as an analyst/programmer.
- The beneficiary claimed to have worked for [REDACTED] in Hyderabad, India, from September 1, 1999, through April 30, 2000, as an analyst/programmer.

The record contains experience letters confirming the beneficiary's claimed employment for the petitioner, [REDACTED] Ltd., and [REDACTED]

In its February 28, 2014, NOID the AAO pointed out that Line J.21 of the labor certification states that the beneficiary did not "gain any of the qualifying experience with the employer." However, the beneficiary's claimed work history does not show any other past employment as a "Business Systems Consultant" and does not identify any other work history with many of the duties listed for the offered job including: analyzing business systems requirements, mapping sales/marketing process, providing sales quotations and order management, use of Siebel CRM and Selectica platforms. The petitioner was provided an opportunity to detail and document the beneficiary's work experience that satisfies the requirements that are detailed on the labor certification. However, the petitioner's response to the NOID does not identify any work experience possessed by the beneficiary that satisfies the stated requirements.

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.

Conclusion

In summary, the petitioner failed to establish its ability to pay the proffered wage as of the priority date. The petitioner also failed to establish that the beneficiary possessed the work experience required by the terms of the labor certification. 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 appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. 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, and the petition is denied.