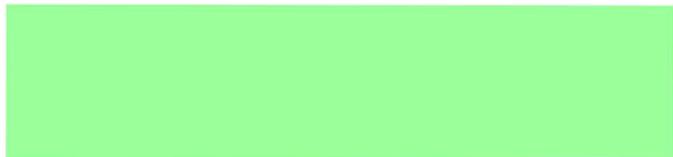


(b)(6)

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



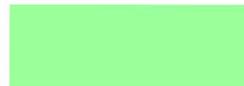
U.S. Citizenship
and Immigration
Services



DATE: OCT 03 2014

OFFICE: TEXAS SERVICE CENTER

FILE:



IN RE:

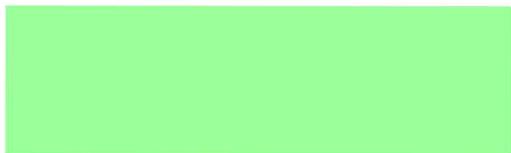
Petitioner:

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, Texas Service Center (Director). The petitioner filed a motion to reopen and reconsider. The Director granted the motion, but denied the petition again. The case is now on appeal before the Chief, Administrative Appeals Office (AAO). The Director's decisions will be withdrawn and the case remanded for further consideration.

The petitioner is an information technology (IT) consulting company. It seeks to employ the beneficiary permanently in the United States as a senior software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). This section of the Act provides for immigrant classification to members of the professions holding advanced degrees or their equivalent whose services are sought by an employer in the United States. 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.

The petitioner filed its Form I-140, Immigrant Petition for Alien Worker, on February 14, 2011. The petition was accompanied by an Application for Permanent Employment Certification, ETA Form 9089, (labor certification) which was filed with the Department of Labor (DOL) on September 2, 2010, and certified on November 2, 2010. The ETA Form 9089 specifies that the minimum education required for the proffered position is a master's degree in computer science, engineering, or mathematics or a "foreign educational equivalent" (Part H, lines 4, 4-B, 7, 7-A, and 9), and that the minimum experience required is 12 months in the "job offered" or in an alternate occupation such as software developer or "any suitable combination" of experience, education, and training" (Part H, lines 6, 10, 10-A, and 10-B). The ETA Form 9089 also specifies that no alternate combination of education and experience is acceptable (Part H, line 8).

As evidence that the beneficiary met the educational and experience requirements of the labor certification, the petitioner submitted the following documentation with its initial filing:

- photocopies of an academic degree and partial transcripts showing that the beneficiary earned a master of science in computer science from [REDACTED] in Connecticut on December 19, 2004; and
- a letter from the CEO of [REDACTED] Pennsylvania, dated February 9, 2010, stating that the beneficiary had been employed as a senior software developer from June 2005 to August 2009 and describing his duties.

On August 9, 2013, the Director issued a Request for Evidence (RFE), which noted that the ETA Form 9089 listed (in addition to [REDACTED]) two other former employers of the

beneficiary – [REDACTED] Pakistan (June 1, 2000 to July 1, 2001) and [REDACTED] New Jersey (January 1, 2005 to June 1, 2005). The RFE requested that the petitioner submit letters from these two companies verifying the beneficiary's employment with them (as a programmer and a software engineer, respectively). The RFE also requested that Forms W-2 (Wage and Tax Statements) be submitted from all three former employers listed on the labor certification, as well as from the petitioner (where the beneficiary began working on September 28, 2009, according to the labor certification) as evidence of the compensation received by the beneficiary.

The petitioner responded to the RFE with a letter from counsel, dated August 30, 2013, and additional documentation. In the letter counsel pointed out that the labor certification requires only 12 months of qualifying experience, and that the previously submitted letter from [REDACTED] documented more than four years of experience by the beneficiary. Thus, proof of the beneficiary's additional experience with the other two employers listed on the ETA Form 9089 was unnecessary for the purpose of establishing the beneficiary's qualification for the job offered. Nevertheless, the petitioner submitted photocopies of letters from (1) the "Regional Manager Wireless Business" of [REDACTED] Pakistan, dated July 10, 2001, describing the beneficiary's employment as a programmer from June 1, 2000 to July 1, 2001, and (2) the vice president of [REDACTED] New Jersey, dated December 18, 2006, describing the beneficiary's employment as a software engineer from January 2005 to June 2005. The petitioner also submitted photocopies of Forms W-2 issued to the beneficiary from the petitioner for the years 2009-2012 and from [REDACTED] (and its predecessor-in-interest, [REDACTED]) for the years 2005-2009. The petitioner indicated that no Forms W-2 were issued by the beneficiary's two earlier employers because (1) [REDACTED] was a Pakistani company, not a U.S. company, and (2) the beneficiary utilized Optional Practical Training¹ in working for [REDACTED] was not paid, and therefore was not issued a Form W-2.

On September 10, 2013, the Director issued a Notice of Intent to Deny (NOID) the petition. The Director noted that the petitioner's address on the Form I-140 and the primary worksite location according to the ETA Form 9089 – [REDACTED] New Jersey – is the residence of the petitioner's CEO with no evidence of business activity conducted at the site. The Director also noted that the Forms W-2 and pay statements in the record identified two different addresses for the petitioner's business: [REDACTED], New Jersey, for the years 2009-2011 and 2013, but [REDACTED] New Jersey, a commercial property, for the year 2012. Furthermore, all of the documentation indicated that the beneficiary resided in Pennsylvania [REDACTED] throughout the time period of 2009-2013. The petitioner was advised to provide a clarification with regard to its business address, and an explanation as to how the beneficiary could work in New Jersey while living in Pennsylvania, or evidence that the beneficiary was actually working in Pennsylvania. The petitioner was also advised to submit its business licenses and lease agreement(s) for the two business locations identified above, as well as evidence of the number of employees and their duties at the two locations.

¹ Optional Practical Training (OPT) is available to foreign students in F-1 visa status. See 8 C.F.R. § 214.2(f)(10)-(12).

The petitioner responded to the NOID with a letter from counsel, dated September 30, 2013, and additional documentation. With respect to the beneficiary's residence in Pennsylvania (in 2009, from 2010 to 2013), the petitioner indicated that this was appropriate since he was required to support a client located there. As evidence thereof the petitioner submitted photocopies of two purchase orders, dated October 12, 2009 and April 16, 2013, under an agency agreement between and the petitioner, dated August 17, 2009, whereby the beneficiary was assigned to an end client in PA, to perform IT services in an annuity risk management project that began in September 2009 and was still underway at the end of 2013, with an annual extension slated for 2014. The petitioner also submitted a photocopy of an agreement between the beneficiary and dated September 18, 2009, defining their business relationship and confirming that would pay the petitioner for the beneficiary's services, and that the beneficiary would be compensated by the petitioner. The petitioner acknowledged that the address is the residence of its owner and that no business has ever been conducted there, but indicated that the address has been used for various corporate and reporting purposes. The petitioner submitted a photocopy of the sublease agreement whereby it leased some commercial space at ² New Jersey, for a two-year period from May 1, 2011 to April 30, 2013. The petitioner stated that four employees currently worked at that address, including one IT consultant, but that all other employees worked at various client sites.

On October 16, 2013, the Director issued a second NOID, stating that "[a]fter reviewing the evidence . . . and further research, it is determined that the employment letters from . . . have been misrepresented on the labor certification."

The Director stated that it tried to contact using the telephone numbers provided on the letters, but that "the attempt was unsuccessful" in both cases. As a result, the Director intended to deny the petition for failure of the petitioner to establish that the beneficiary had the requisite work experience to qualify for the job offered. The Director again requested copies of the beneficiary's Forms W-2 from for the years 2005-2009, and from for 2005, as evidence that the beneficiary was employed by each, despite its previous request for the same materials in the RFE. As previously discussed, the petitioner already submitted the Forms W-2 from for the years 2005-2009, and has indicated that no such forms were issued by since the beneficiary received no compensation for his five-months of Optional Professional Training in F-1 status.

The petitioner responded to the second NOID with a letter from counsel, dated October 30, 2013, and additional documentation. The petitioner resubmitted copies of the beneficiary's Forms W-2 from and submitted an updated letter from the company's CEO, dated October 18, 2013, confirming that the beneficiary was employed as a senior software developer from June 2005 to August 2009. The letter indicated that the contact number given in the company's previous letter in February 2010 was no longer active, and provided a new number and contact person. With regard to the petitioner repeated the claim that this employment was irrelevant because the beneficiary exceeded the one-year experience requirement of the labor

² is a township adjacent to

certification with his work at [REDACTED]. Nevertheless, the petitioner submitted a photocopy of the Employment Authorization Card issued to the beneficiary for his Optional Practical Training, valid from December 18, 2004 to December 17, 2005, as well as a photocopy of his Certificate of Eligibility for Nonimmigrant (F-1) Student Status (Form I-20). The petitioner reiterated that the beneficiary received no Form W-2 from [REDACTED] because he was unpaid, and resubmitted a copy of the previous employment confirmation letter, dated December 18, 2006, because the company was now out of business.

On November 12, 2013, the Director denied the petition “due to discrepancies in the labor certification” with regard to the beneficiary’s job location. In his decision the Director noted that the ETA Form 9089 identified the beneficiary’s primary worksite as [REDACTED] New Jersey, which is the residential address of the petitioner’s owner. As pointed out by the Director, however, the letter from the petitioner’s counsel dated September 30, 2013 (responding to the first NOID) acknowledged that “the beneficiary did not report for work at this location” and stated that “[t]he petitioner’s primary business activities are performed at [REDACTED] [in] [REDACTED] New Jersey.” The Director interpreted this language as a statement from the petitioner that “the beneficiary will actually be working at a location in [REDACTED] New Jersey,” and concluded that “[t]his statement conflicts with the location of the job opportunity as reflected on the certified ETA 9089.” According to the Director, the petitioner “was asked to submit evidence as to the actual location of the job opportunity within the [REDACTED] New Jersey, metropolitan statistical area [MSA] but the petitioner failed to submit any documentary evidence regarding the location of the job opportunity.”

On December 11, 2013, the petitioner filed a motion to reopen or reconsider on Form I-290B, along with a brief from counsel and supporting documentation. On the Form I-290B the petitioner contended that the Director failed to address the fact that the petitioner’s commercial office address at [REDACTED] New Jersey, is just 4.1 miles – a “normal commuting distance” – from the jobsite address indicated on the labor certification at [REDACTED] New Jersey. According to the petitioner, therefore, “the location of the beneficiary’s job opportunity is within the same area of intended employment as . . . the address listed on the ETA Form 9089.” In counsel’s brief the petitioner pointed out that it began using its new business premises at [REDACTED] on May 1, 2011, eight months after the labor certification application was filed on September 2, 2010, six months after it was certified on November 2, 2010, and approximately four months after the Form I-140 petition was filed on January 12, 2011. According to the petitioner the Director ignored evidence of its business operations, and hence the beneficiary’s work location, at [REDACTED] commencing in 2011. Additional documentation was submitted with the motion and cited in counsel’s brief to show that the petitioner is conducting business at the [REDACTED] address. The petitioner cited the DOL regulation at 20 C.F.R. § 656.30(c)(2), which provides that a labor certification remains valid if the job offered continues to be located in the same area of intended employment as stated on the ETA Form 9089 (or Form ETA 750).

On May 20, 2014, the Director issued another decision, finding that the requirements for a motion to reopen and a motion to reconsider were met and that “[t]he petitioner has established that the decision

was incorrect based on the evidence of record when Form I-140 was initially denied.” The only reference to the job location issue, however, was the Director’s reference to the petitioner’s “state[ment] that the petitioner’s work location [is] listed as [REDACTED] NJ, by way of a sublease agreement between the property’s owner . . . and the petitioner (emphasis added).” The Director went on to find that “the issue in question is the beneficiary’s employment with [REDACTED].” According to the Director, the employment confirmation letter from that company was not verifiable because the phone number it provided did not lead to a contact person or provide the opportunity to leave a message. The Director concluded that the beneficiary’s claim of employment with [REDACTED] was “false.” Therefore, while finding that the petitioner had overcome the ground for denial in the initial decision, the Director “ordered that the original decision denying the Form I-140 remains denied” due to the beneficiary’s “lack of verifiable documented proof of employment” with [REDACTED].

The petitioner filed a timely appeal on June 19, 2014, along with a brief from counsel and supporting documentation. In the appeal brief the petitioner points out that the only ground for denial in the Director’s initial decision on November 12, 2013, was the petitioner’s failure to establish the worksite location of the job offered. The decision made no mention of any deficiencies in the beneficiary’s experience qualifications. Nevertheless, in the subsequent decision on May 20, 2014, the Director’s sole ground for denial was the beneficiary’s failure to adequately document the beneficiary’s employment with [REDACTED] in 2005. Given the fact that the beneficiary’s four years of documented experience with [REDACTED] exceeded the labor certification’s requirement of one year of qualifying experience, the petitioner asserts that the beneficiary’s additional experience with [REDACTED] is irrelevant to the issue of the beneficiary’s qualification for the proffered position. While questioning its relevance and necessity, the petitioner nonetheless submits additional documentation as evidence of the beneficiary’s work for [REDACTED] (including an affidavit from a former colleague) and the company’s business operations generally.

We conduct appellate review on a *de novo* basis. See *Soltane v. Department of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). In our view the Director’s decisions are confusing and inconsistent.

In the initial denial, dated November 12, 2013, the Director incorrectly stated that the petitioner failed to submit any documentary evidence regarding the location of the job opportunity at issue in this proceeding. In responding to the initial NOID the petitioner submitted documentary evidence that the beneficiary was assigned to a client in [REDACTED] Pennsylvania, when he was first hired by the petitioner in 2009, and that he was working for that client four years later, in 2013, as well. This evidence was not considered by the Director.

The initial denial was based solely on “discrepancies in the labor certification” with regard to the beneficiary’s job location. The second NOID that preceded the decision had advised the petitioner that the Director also intended to deny because of perceived misrepresentations regarding the beneficiary’s claimed employment with [REDACTED]. The Director appeared to be satisfied by the petitioner’s response to the second NOID, however, because no such basis for denial was included in the initial decision.

In contrast to the initial decision, the denial in the second decision, dated May 20, 2014, is based on the Director's finding that the petitioner failed to adequately document the beneficiary's employment with [REDACTED]. No explanation is provided as to why that ruling was made for the first time in the second decision. Nor does the Director sufficiently explain why the beneficiary's five months of claimed employment with [REDACTED] are so important to the adjudication of the petition since the evidence of record shows that the beneficiary exceeded the experience requirement for the job offered in his more than four years of work for [REDACTED].

In the second decision the Director states that his initial decision was "incorrect" without clearly explaining how. The Director refers exclusively to the petitioner's work location at [REDACTED] in [REDACTED] New Jersey, which the evidence of record clearly shows is NOT the work location of the beneficiary. The second decision lacks any finding by the Director as to where the beneficiary will be working, and whether that location accords with the specifications of the labor certification.³

For all of the reasons discussed above, we conclude that the Director's prior decisions must be withdrawn and the case remanded for further consideration of the issues dealt with therein, and the evidence submitted by the petitioner, as well as any other matters the Director may deem appropriate. The Director will then issue a new decision.

ORDER: The Director's decision's dated November 12, 2013, and May 20, 2014, are withdrawn. The petition is remanded to the Director for further consideration in accordance with the foregoing discussion. The Director may request additional evidence from the petitioner, if so desired, and prescribe a time period for its submission. A new decision will then be issued by the Director.

³ The petitioner has also been less than clear about the beneficiary's job location. In its motion to reopen and reconsider of December 11, 2013, the petitioner contended that the short commuting distance between the jobsite address indicated on the labor certification (the residence of the petitioner's owner in Plainsboro, New Jersey) and the petitioner's new commercial premises (in Princeton, New Jersey) showed that "the location of the beneficiary's job opportunity is within the same area of intended employment as . . . the address listed on the ETA Form 9089." This claim is inconsistent with the evidence of record showing that the beneficiary is not one of the four employees located at the petitioner's business premises in Princeton, New Jersey, and that the beneficiary is working for a client in West Chester, Pennsylvania.