



U.S. Citizenship  
and Immigration  
Services

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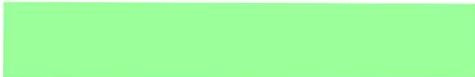


DATE: **SEP 04 2014**

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:

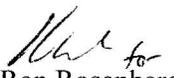


INSTRUCTIONS:

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 Director, Texas Service Center, (director) denied the employment-based 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 software consulting business. It seeks to permanently employ the beneficiary in the United States as a senior quality assurance analyst. 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 petitioner will be the beneficiary's actual employer and was authorized to file the instant petition.

### 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 March 4, 2013.<sup>2</sup>

Part H of the labor certification states that the offered position requires a minimum of a bachelor's degree in computer science or business administration and five years of experience as a quality assurance analyst. Part H.14 of the labor certification clarifies that "this position requires a 4 year Bachelor's or equivalent degree with 5 years relevant work experience or a 3 year Foreign Bachelor's degree plus 2 years Foreign Masters degree with 5 years relevant experience. Will accept foreign degree equivalents."

Part J of the labor certification states that the beneficiary possesses a bachelor's degree in business administration from [REDACTED] in India, completed in 1999. The record contains a copy of the beneficiary's Bachelor of Commerce diploma and transcripts from [REDACTED] issued in 1998. The record also contains a copy of the beneficiary's Master of Commerce diploma and transcripts from [REDACTED] issued in January 2001.

The record also contains an evaluation of the beneficiary's educational credentials prepared by [REDACTED] for the [REDACTED] on February 20, 2013. The evaluation states that the beneficiary's successive academic degrees formed "the equivalent of a four-year Bachelor of Business Administration Degree, with a further concentration in Accounting."

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

- Employment for the petitioner as a quality assurance analyst in [REDACTED] Virginia,

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<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).

- since March 2, 2012;
- Employment as a quality assurance analyst for [REDACTED] in [REDACTED] Virginia, from April 1, 2009, through March 1, 2012; and,
  - Employment as a quality assurance analyst for [REDACTED] in [REDACTED] Virginia, from May 1, 2008, through March 31, 2009;
  - Employment as a quality assurance analyst for [REDACTED] [REDACTED] India, from June 25, 2007, through November 20, 2007;
  - Employment as a quality assurance analyst for [REDACTED] India, from November 10, 2003, through June 21, 2007

The record contains the following supporting evidence:

- an experience letter from [REDACTED] letterhead stating that the company employed the beneficiary full-time as a quality assurance analyst from April 1, 2009, through March 1, 2012;
- a letter dated September 24, 2007, to the beneficiary from [REDACTED] on [REDACTED] letterhead stating that the company wished to employ him as a programmer analyst;
- an experience letter from [REDACTED] letterhead stating that the beneficiary worked there full-time from June 25, 2007, through November 20, 2007, as a software engineer;
- a March 22, 2007, experience letter from [REDACTED] letterhead stating that the beneficiary had worked there full-time as a software test engineer since November 2003; and,
- a June 21, 2007, letter from [REDACTED] letterhead stating that the beneficiary worked there as a test engineer from November 10, 2003, through June 21, 2007.

The director issued a Request for Evidence (RFE) on November 12, 2013, requesting additional documentation to establish that a *bona fide* job offer existed, and to establish that the petitioner would be the beneficiary's actual employer.

In response to the RFE the petitioner submitted a May 22, 2013, letter from [REDACTED] [REDACTED] letterhead discussing the beneficiary's placement. Ms. [REDACTED] stated that the beneficiary remained an employee of the petitioner, but was providing consulting services to [REDACTED] Maryland. Ms. [REDACTED] did not explain the relationship between her company and either the beneficiary or the petitioner.

Also in response to the RFE the petitioner submitted a copy of "Exhibit D," which is identified as an attachment to a "Master Consulting Agreement & the Flowdown provisions between [REDACTED] & [REDACTED] executed on January 25, 2011." However the actual consulting agreement was not provided. This document states that the beneficiary would be paid a rate of "\$40" and that the contract would be in effect from January 4, 2013, through December 31, 2013. It is noted that an

hourly wage of \$40 equates to \$83,200 per year, which is significantly less than the proffered wage of \$120,016 per year.

The petitioner also submitted a March 2, 2012, “Offer of Employment” made to the beneficiary. This document indicates that the beneficiary “shall report to [REDACTED] during his employment. This document states that the beneficiary would be paid \$60,000 per year.

The director concluded that the petitioner had not established that a *bona fide* job offer existed between itself and the beneficiary. Therefore, the director denied the petition on December 4, 2013. On appeal, the petitioner states that the “evidence submitted in response to the RFE clearly demonstrates that the petitioner continues to offer a bona fide job offer to the beneficiary” and asserts that the director over-stepped his authority in requiring documentation detailing the nature of the business relationship between the petitioner and the beneficiary.

The petitioner’s appeal is properly filed and makes a specific allegation of error in law or fact. We conduct appellate review on a *de novo* basis.<sup>3</sup> We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>4</sup> We may deny a petition that fails to comply with the technical requirements of the law even if the director does not identify all of the grounds for denial in the initial decision.<sup>5</sup>

## 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-

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<sup>3</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>4</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>5</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).

- (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 or as to whether the petitioner is eligible to file a petition. 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>6</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 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.

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

§ 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, whether the offered position and the beneficiary are eligible for the requested employment-based immigrant visa classification, and whether the petitioner is eligible to file the petition.

### **Eligibility to file the petition**

The regulation at 8 C.F.R. § 204.5(c) provides that “[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under...section

203(b)(3) of the Act.” In addition, the Department of Labor (DOL) regulation at 20 C.F.R. § 656.3<sup>7</sup> states:

*Employer* means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

From the record, it is unclear that the petitioner will be the beneficiary’s actual employer. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). The petitioner must demonstrate that it would employ the beneficiary directly, and not that the petitioner would source the beneficiary with a third party as the actual employer.

In this case, the petitioner did submit copies of paystubs and a copy of the Internal Revenue Service (IRS) Form W-2 showing that the beneficiary was paid by the petitioner. However, payment of wages is only one of many factors considered in determining whether an employer-employee relationship exists.

The letter from [REDACTED] states that the beneficiary is an employee of the petitioning company, not of [REDACTED]. However, she does not explain [REDACTED]’s role in the beneficiary’s employment chain, nor does she explain who controls and supervises the beneficiary’s day-to-day employment.

The submitted “Exhibit D” does not explain the relationship between the companies and is not accompanied by the referenced “Master Consulting Agreement & the Flowdown provisions between [REDACTED] & [the petitioner].”

The submitted “Employment Agreement” between the petitioner and the beneficiary states that the beneficiary “shall report back to Employer 2 time(s) per month for an evaluation of progress, performance, and goals.” However, this document does not suggest that the petitioner would be directing the beneficiary’s day-to-day activities and does not describe the roles of [REDACTED] in directing the beneficiary’s work.

Finally, the submitted “Offer of Employment” from the petitioner to the beneficiary states that the beneficiary “shall report to [REDACTED].” The document does not further elaborate

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<sup>7</sup> The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date.

on the chain of command or the supervision of the beneficiary's work and does not describe the roles of [REDACTED] in directing the beneficiary's work.

Counsel asserts on appeal that the director over-stepped his authority and was requiring that the petitioner provide more evidence than was necessary to prove eligibility "by a preponderance of evidence." In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Nothing in the record of proceeding contains any type of notice from the director or any other USCIS representative that would have misled counsel into his assertion that USCIS requires "convincing" or "persuading" evidence beyond what legal authority guides the agency in statute, regulatory interpretation, precedent case law and administrative law and procedure. Generally, when something is to be established by a preponderance of evidence, it is sufficient that the proof establish that it is probably true. *Matter of E-M-*, 20 I&N Dec. 77 (Comm'r 1989). The evidence in each case is judged by its probative value and credibility. Each piece of relevant evidence is examined and determinations are made as to whether such evidence, either by itself or when viewed within the totality of the evidence, establishes that something to be proved is probably true. Truth is to be determined not by the quantity of evidence alone, but by its quality. *Matter of E-M-*, 20 I&N Dec. 77 (Comm'r 1989).

On July 3, 2014, we issued a Request for Evidence (RFE) and notified the petitioner that the evidence submitted either fails to describe the direction of the beneficiary's work (letter from ASN, and Employment Agreement) or suggests that a third party would be supervising the beneficiary's work (employment agreement). Our RFE noted that the submitted document titled "Exhibit D" makes reference to a "Master Consulting Agreement & the Flowdown provisions between [REDACTED] [the petitioner]" and the title of this document suggests that it might provide the required description of the relationship between the petitioner, the beneficiary, and the third parties.

In response to our RFE, counsel submitted a November 20, 2013, letter from the petitioner stating that an employer-employee relationship does exist between itself and the beneficiary and stressing that it pays the beneficiary's salary. Counsel submitted a copy of a "Subcontracting Agreement" between the petitioner and [REDACTED] dated January 25, 2011. This agreement indicates that it is the petitioner's responsibility to "recruit, screen, test, reference check, complete I-9 verification and assign temporary personnel to perform temporary job assignment duties at work sites." However, this document does not suggest that the petitioner would be involved in the day-to-day supervision or direction of the beneficiary's work. The petitioner did not provide a copy of the document titled "Master Consulting Agreement & the Flowdown provisions between [REDACTED] & [the petitioner]" even though our RFE specifically noted that this document was referenced by other evidence in the record but was not, itself, entered into the record of proceedings.

The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Although specifically and clearly requested by the director and again by us, the petitioner declined to provide evidence detailing the relationship between the petitioner, the beneficiary, the staffing company, and the end client. The petitioner's failure to submit these documents cannot be excused.

The petitioner failed to establish that it would be the beneficiary's actual employer. Therefore, the petitioner failed to establish that it was eligible to file the petition on behalf of the beneficiary. Accordingly, the petition must be denied.

### III. CONCLUSION

In summary, the petitioner failed to establish that the beneficiary would be its employee working under its control. Therefore, the petitioner has not established that it is eligible to file the petition under 8 C.F.R. § 204.5(c). The director's decision to deny 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.