



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF MSET-, LLC

DATE: DEC. 1, 2015

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a remanufacturer and distributor of toner cartridges, inkjets, and thermal transfer ribbons, seeks classification for the Beneficiary as an individual of exceptional ability in science. *See* § 203(b)(2) of the Immigration and Nationality Act (Act); 8 U.S.C. § 1153(b)(2). The Director, Nebraska Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The classification the Petitioner seeks makes visas available where a petitioner can document a beneficiary's exceptional ability in the sciences, arts, or business, and that the position the beneficiary will fill requires an individual of exceptional ability. The Director determined that the Petitioner had not satisfied the initial evidentiary requirements to show the Beneficiary's exceptional ability, as set forth at 8 C.F.R. § 204.5(k)(3)(ii). In addition, the Director found that the Beneficiary's intended position was not one that required an individual of exceptional ability, as required by 8 C.F.R. § 204.5(k)(4)(i). On appeal, the Petitioner submits a legal brief and additional materials. While we withdraw the Director's finding that the Beneficiary is not an individual with exceptional ability, we agree that the Petitioner has not demonstrated that the position requires an individual with that level of ability.

I. LAW

Section 203(b)(2)(A) of the Act states in pertinent part:

... Visas shall be made available ... to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

To show that a beneficiary is an individual of exceptional ability in the sciences, arts, or business, the petition must be accompanied by documentation that meets at least three of the six criteria at 8 C.F.R. § 204.5(k)(3)(ii). Satisfaction of at least three criteria, however, does not, in and of itself, establish eligibility for this classification. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010)

(discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination). *See also Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010) (holding that the “truth is to be determined not by the quantity of evidence alone but by its quality” and that USCIS examines “each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true”).

In addition, every petition under this classification must be accompanied by documentation that the beneficiary’s services are sought by an employer in the United States. 8 C.F.R. § 204.5(k)(4)(i). An example of documentation that can satisfy this requirement is an individual labor certification from the Department of Labor, however, in such a case, “[t]he job offer portion of the individual labor certification . . . must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.” *Id.*

II. ANALYSIS

A. Beneficiary’s Exceptional Ability

One of the reasons for the Director’s denial was that the Petitioner did not demonstrate the Beneficiary qualified as an individual of exceptional ability. Specifically, the Director found the Petitioner met only two of the six evidentiary prongs, and not the minimum three. On appeal, the Petitioner asserts it meets the following three criteria.

Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought.

The Director found that the Petitioner satisfied this criterion. The Petitioner provided an employment letter and other evidence demonstrating that the Beneficiary has worked in his current occupation for at least ten years. We therefore agree that the Petitioner has met this criterion.

Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability.

The Director found that the Petitioner satisfied this criterion. The Petitioner provided an affidavit regarding the Beneficiary’s salary, payroll printouts, as well as information regarding the prevailing wage for his position from the Foreign Labor Certification Data Center. This evidence is sufficient to satisfy this criterion.

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Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

The Director found the Petitioner did not provide sufficient evidence to meet this criterion. Upon review of the entire record, we disagree and find that the Petitioner has satisfactorily demonstrated that the Beneficiary has received recognition for his achievements in the field.

In a March 5, 2010, letter accompanying the petition, [REDACTED] President of the Petitioner, stated that the company's "entire remanufacturing process is driven by [the Beneficiary]," whose efforts "have earned numerous awards for our company from [REDACTED]

[REDACTED] further confirmed that the Beneficiary is listed as an inventor on two approved patents involving toner cartridges and has three additional pending patent applications. The Petitioner submitted corroborating evidence of the Beneficiary's patents.

The Petitioner provided a publication from [REDACTED] regarding inaugural selections to its Hall of Fame. The magazine chose the Petitioner's founders as inductees due to the company's success as an innovator in the toner cartridge remanufacturing industry. While the article does not mention the Beneficiary by name, the articles attribute the Petitioner's success to several key innovations, some of which correspond to the Beneficiary's approved and pending patent applications. For example, the article cites the Petitioner's "patented ultrasonic welding techniques," a method described in patent [REDACTED] for which the Beneficiary and the company president are the two listed inventors.

As additional evidence of the significance of the Beneficiary's work, the Petitioner submitted letters from representatives of companies with whom the Petitioner does business, attesting to the Beneficiary's expertise and the importance of his work. Many of the letters expressed the opinion that the Beneficiary's past innovations had significantly impacted the field of printer cartridge recycling and remanufacturing. For example, the Petitioner provided a letter from [REDACTED] President and Chief Executive Officer of [REDACTED], which has had "a contractual vendor relationship" with the Petitioner since 2003. [REDACTED] stated:

At the heart of [the Petitioner's] remanufacturing process is [the Beneficiary]. Through his extensive experience and skills [he] has fully mastered the remanufacturing process for laser and toner cartridges. . . .

Additionally, [the Beneficiary] is responsible for benchmarking [the] particle size of toner, improving the print quality and yield of print jobs, while minimizing waste. . . .

For his laudable work, [the Beneficiary] accepted the [REDACTED] Readers Choice Award for [REDACTED] in [REDACTED] on behalf of [the

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Petitioner, which] chose [the Beneficiary] to accept this award on behalf of the company because the award was received due to his hard work. Moreover, he has been pivotal in helping [the Petitioner] to achieve numerous other awards from

We find that the above evidence sufficiently establishes recognition for the Beneficiary's achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations. Considering the Beneficiary's extensive experience, salary and recognized contributions in the aggregate, the Petitioner has demonstrated that the Beneficiary has a degree of expertise significantly above that ordinarily encountered in the field. 8 C.F.R. § 204.5(k)(2)(definition of exceptional ability). Accordingly, we withdraw the Director's determination to the contrary and find that the Petitioner has shown the Beneficiary's exceptional ability.

B. Position Requiring Exceptional Ability

The remaining reason for the Director's denial was that the Petitioner did not demonstrate that the Beneficiary's position is one that requires an individual of exceptional ability. The Petitioner seeks classification for the Beneficiary as a Senior Research and Development Technician. The Petitioner provided a labor certification, ETA Form 9089, for the position from the U.S. Department of Labor. In her denial, the Director reasoned that, because none of the job requirements specified on the labor certification are consistent with the regulatory requirements for exceptional ability, the position cannot be said to require such an individual.

The labor certification indicates the annual wage the Petitioner will offer for the position is between \$59,000 and \$85,000. The prevailing wage for the position, is \$26.88 per hour, which annualizes to \$55,910.40. The Prevailing Wage Request form designates the position as level three, for which the wages are \$60,029 per year as reflected in the materials of record from www.flcdatcenter.com. According to the labor certification, the position requires a high school education and three years of experience. Box 14 of the ETA Form 9089 reads:

Three years of experience with disassembly, assembly and testing of imaging toner supplies; three years of managerial experience; three years of experience with electro-photo-printing technology; and two years of experience with qualifying and testing imaging materials, and providing engineering sales support, technical support and customer site troubleshooting. Must be able to write build instructions, and to use Microsoft Word, Excel and PowerPoint.

The Petitioner acknowledges that the minimum requirements specified on the labor certification do not meet the exceptional ability regulatory criteria. The record is consistent with that conclusion. The labor certification indicates a general high school diploma is sufficient for the job at issue, while the exceptional ability criterion requires an "official academic record showing that the alien has a

degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability.” 8 C.F.R. § 204.5(k)(3)(ii)(A). The position does not require a license or membership in a professional association, both of which are possible means of demonstrating exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(C) & (E). The position requires only three years relevant experience, as opposed to the ten years needed for the experience criterion. 8 C.F.R. § 204.5(k)(3)(ii)(B). The offered wage on the labor certification of \$59,000 to \$85,000 is generally consistent with the prevailing wage of \$26.88 per hour and the level three wage calculated by the Department of Labor. The offered wage, therefore, is not indicative of a salary or remuneration consistent with exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(D). Lastly, the specific skills listed in Box 14 of the labor certification, though mandating experience with certain job functions, do not require achievements and significant contributions to the industry or field as acknowledged by peers, governmental entities, or professional or business organizations as specified in 8 C.F.R. § 204.5(k)(3)(ii)(F), or comparable evidence to the six exceptional ability criteria. 8 C.F.R. § 204.5(k)(3)(iii).

On appeal, the Petitioner asserts that the Director incorrectly conflated Department of Labor standards with ours when she compared the job requirements on the labor certification with the exceptional ability criteria at 8 C.F.R. § 204.5(k)(3)(ii)(A) through (F). The Petitioner also maintains that the Director imposed *ultra vires* requirements when she analyzed the job requirements reflected on the labor certification. We disagree. The regulation specifically necessitates: “The job offer portion of the individual labor certification . . . must demonstrate that the job requires . . . an alien of exceptional ability.” 8 C.F.R. § 204.5(k)(4)(i). As a result, analyzing the position’s requirements as stated on the labor certification is not a conflation of standards or *ultra vires*: it is required under the regulations.

By way of analogy, the classification at section 203(b)(2)(A) of the Act also includes “qualified immigrants who are members of the professions holding advanced degrees.” The regulation at 8 C.F.R. § 204.5(k)(4)(i) provides: “The job offer portion of the individual labor certification . . . must demonstrate that the job requires a professional holding an advanced degree or the equivalent” As a result, we regularly require the labor certification to affirm that the minimum education acceptable for those positions is an advanced degree.

For these reasons, the Petitioner has not shown that the Beneficiary’s intended position is one requiring an individual of exceptional ability. As a result, the Petitioner has not demonstrated eligibility for the classification sought.

C. Summary

For the classification sought, the Petitioner must establish, among other things, (1) that the Beneficiary’s intended position requires an individual of exceptional ability, and (2) that the Beneficiary possesses exceptional ability. Although the Petitioner has successfully showed that the Beneficiary is an individual of exceptional ability, it has not demonstrated that the Beneficiary’s

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intended position requires an individual of exceptional ability. As a result, the Petitioner has not met the conditions for the classification sought.

III. CONCLUSION

The Petitioner has not demonstrated that the Beneficiary is as an alien of exceptional ability who seeks to enter the United States to work in a position requiring an alien of exceptional ability. 8 C.F.R. § 204.5(k)(4)(i). We dismiss the appeal 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. Here, the Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of MSET-, LLC*, ID# 10536 (AAO Dec. 1, 2015)